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FIRE INSURANCE CASES:

BEING

A COLLECTION OF ALL THE REPORTED CASES
ON FIRE INSURANCE, IN ENGLAND, IRELAND,
SCOTLAND, AND AMERICA,

FROM

THE EARLIEST PERIOD TO THE PRESENT TIME,

CHRONOLOGICALLY ARRANGED.

VOL. II.

COVERING THE PERIOD FROM 1840 TO 1848.

WITH NOTES AND REFERENCES.

BY

EDMUND H. BENNETT.

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To
HON. LINCOLN F. BRIGHAM,
~~CHIEF~~ JUSTICE OF THE SUPERIOR COURT OF MASSACHUSETTS,

This Volume
IS RESPECTFULLY DEDICATED

BY THE EDITOR.

PREFACE.

It was the original design of the editor to complete this work in two volumes ; but it was found, upon a careful examination of the cases, that this would require, either so great a condensation of them as to make the work scarcely more than a Digest, or the omission of many decisions. Neither of these methods was satisfactory, and the plan of the first volume has been pursued in the second, and will be continued through the series. The work will be completed in two, or, at most, in three more volumes.

The present volume embraces the American and foreign (English, Scotch, Irish, Canadian, &c.) cases decided between the years 1840 and 1848, and contains an unusual number of valuable decisions. The cases relating to insolvent companies are especially numerous, and are believed to be very opportune. It was thought best, for the sake of convenience, to interrupt slightly the chronological order of the cases on this subject, and they have been accordingly placed together, beginning with p. 579. The undersigned has been greatly assisted in the preparation of this volume by Melville M. Bigelow, Esq., of the Boston Bar.

The third volume will be published soon.

EDMUND H. BENNETT.

BOSTON, *February 1, 1873.*

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FIRE INSURANCE CASES.

LIGHTBODY *vs.* THE NORTH AMERICAN INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1840.)

Insurance by Agent. — Revocation. — Delivery of Policy.

An insurance company are bound by a policy issued by an agent appointed to effect insurances for a particular city and its vicinity, although he insures property at a distance of 100 miles in another city, for which and its vicinity the company had another agent, if the agent issuing the policy claims to have authority to effect the insurance, and the fact of the existence of the other agency is not brought home to the knowledge of the assured.

If facts transpired, on the application for the insurance to put the applicant upon inquiry as to the authority of the agent, they should have been submitted to the jury, and cannot be urged on a bill of exceptions in support of a motion for a new trial.

Evidence that the agent of the company in the place where the buildings insured were situated, would not have insured them had application been made to him, was held not to be admissible.

A policy bearing date on the day the premium is paid, takes effect by relation from that day, although not delivered until several days afterwards.

A delivery of a policy by an agent is good, and binding upon the principals where the premium had been previously paid, although the assured had been informed by the principals that they intended to revoke the appointment of the agent, if such delivery takes place before revocation or knowledge on the part of the agent of the intent to revoke.

This was an action on a policy of insurance, tried at the Oneida circuit in October, 1838, before the Hon. Philo Gridley, one of the circuit judges.

The plaintiff claimed that the defendants, on the 30th March, 1837, insured against fire four wooden stores belonging to him, situate in Utica, for the term of one year, and underwrote the sum of \$2,000; and that on the next day the stores were wholly consumed by fire. The plaintiff produced a policy bearing date 30th March, 1837, signed by the President and Sec-

¹ 23 Wend. 18.

retary of the North American Insurance Company, and purporting to be countersigned on the same day at Troy, by H. Z. Hayner, Agent. The company is located in the City of New York, and was formerly known by the name of "The Phoenix Fire Insurance Company." The plaintiff, residing in Utica, sent a survey to R. J. Knowlton, residing in Troy, and wrote him requesting to have insurance effected upon his stores, but designating no company in particular in which to effect the insurance. Knowlton on the receipt of the plaintiff's letter called upon Hayner, and inquired if he had authority to take risks in Utica. Hayner answered that he thought he had; upon which, Knowlton handed him the survey. About a week afterwards Knowlton again called, when Hayner told him that he had authority to make the insurance. Whereupon Knowlton agreed to the terms proposed by Hayner, but not being in funds at the time, to pay the premium, called on the 30th March, 1837, paid the premium, and took a receipt in these words: "Rec'd of Samuel Lightbody thirty dollars, as a premium on an insurance of his modern buildings in Utica, for the amount of two thousand dollars — see survey in my hands, 30th March, 1837. (Signed) H. Z. Hayner, agent for North American Ins. Co. N. Y." When the receipt was given, Hayner said he was busy in court, and would give the policy to Knowlton at a future day. The receipt was given late in the evening of the 30th of March, and at about two o'clock in the morning of the next day the fire broke out in one of the buildings, which consumed the whole of them. The plaintiff prepared and forwarded his preliminary proofs to Hayner, who received them within ten days after the fire. A few days afterwards the plaintiff called upon Hayner for the policy, who made an excuse for not delivering it, but told the plaintiff that he would see him in New York, and there deliver it to him. The policy had been made out previous to the plaintiff's demand of it. The plaintiff proceeded to New York, and on the twenty-first day of April called upon the officers of the company for payment of the loss, who refused to pay, denying the authority of Hayner to make an insurance in Utica. The plaintiff had two interviews with the officers of the company on that day, and at the second interview was

told that Hayner's authority as agent of the company had been revoked; that if Hayner delivered a policy pursuant to his receipt, the company would not be bound by such delivery, and that a letter would be sent to him notifying him of the revocation of his power as agent, — which letter was sent by the first mail. In the mean time, Hayner and the plaintiff met in the city of New York on the same twenty-first day of April, when Hayner voluntarily delivered the policy to the plaintiff without any solicitation from the latter. At this time the plaintiff did not inform Hayner of his powers having been revoked, or of an intended revocation. The letter of revocation bears date on the twenty-second, but was not received by Hayner until the twenty-third day of April. The defendants objected to the reading in evidence of the receipt and the policy, but the objections were overruled, and the defendants excepted.

The defendants read in evidence the letter of appointment of H. Z. Hayner as their agent; in it they inform Mr. Hayner that the late Phoenix Insurance Company has been revived under its present name; that the company propose again assuming country risks and reëstablishing its agencies; and adding, "You have been reappointed an agent of the company for your place for effecting insurances." This letter bore date in October, 1836, and was accompanied by a letter of instructions commencing in these words: "For the purpose of extending their business in Troy and its vicinity, this company have appointed you their agent," &c. The company in those letters informed Hayner that a package of twenty-five policies signed by the president and secretary had been prepared, and would be forwarded to him. On receiving this appointment, Hayner inserted an advertisement in two of the public newspapers in Troy, announcing that he had been appointed an agent of the company to effect insurances on all kinds of buildings, machinery, merchandise, and household furniture, in the city of Troy and its vicinity. It, however, was proved by Knowlton that he had not seen the letter of appointment, the instructions, or the advertisement, and that he called upon Hayner to effect the insurance in consequence of seeing the words on a label upon the door of his office, inscribed, "Phoenix Fire Insurance Company." The defendants also proved that they had an agency for

the city of Utica and its vicinity, in the month of March, 1837; that such agency was advertised, but whether it was known to the plaintiff was not shown. The defendants offered to prove that the risks in the block in which the plaintiff's buildings were situate were very hazardous, and that their agent in Utica had refused to insure buildings in that block, which was generally known in Utica and among the owners and occupants of that block; and also offered to prove by their Utica agent, that if the plaintiff had applied to him for insurance upon the buildings destroyed, he would have refused to take the risk: which offers were objected to and the evidence refused to be received. The defendants next offered to prove by their secretary that he had read the survey signed by the plaintiff, that he had been in the business of fire insurance eleven years, and that the risk in question was a special risk (which by the letter of instructions the agent had no authority to take without consulting his principals), and that the company would not have taken the risk had the application been made at the principal office. This offer was also objected to, and the evidence rejected. The judge charged the jury that the plaintiff was entitled to recover, and the jury accordingly found a verdict in his favor for \$2187.21. The defendants by their counsel having excepted to the charge of the judge, and to the various decisions made by him as to the reception and rejection of evidence, obtained his signature to a bill of exceptions, and now moved for a new trial.

W. C. Noyes, for the defendants, insisted that his clients were not bound by the policy declared upon. Hayner was not authorized to insure buildings in Utica, but was expressly limited to Troy and its vicinity by his appointment and letter of instructions. Again: the policy was not available to the plaintiff, having been received by him after notice that the defendants had repudiated the act of Hayner, and that they intended to revoke his authority. The evidence offered by the defendants, that their agent in Utica had refused to insure buildings in the same block in which the plaintiff's buildings were situated, and that such fact was generally known, and that had application for insurance been made to such agent it would have been declined, ought to have been received; it would have shown

the *mala fides* of the plaintiff in applying for insurance to the agent of the defendants at Troy, and also in receiving the policy after knowledge that the act of Hayner had been disavowed by the defendants. The receipt for the premium and the policy should not have been received in evidence.

C. A. Mann, for the plaintiff. The contract of insurance was perfect on the payment of the premium on the thirtieth day of October, and the subsequent delivery of the policy related back to that day. Hayner had full power to effect the insurance. He is not limited by his appointment or letter of instructions to any particular territory, and being furnished with blank policies, signed by the president and secretary of the company, the plaintiff might well consider him the general agent of the company. If he has violated his private instructions, third persons cannot be affected thereby. The delivery of the policy was previous to the revocation of his power; indeed the policy may well be considered as having been delivered in Troy, at the time when the plaintiff called for it, and the agent promised to take it to New York, and deliver it there.

By the Court, BRONSON, J. Without intending to intimate any opinion in a question which may be made between the principals and their agent, I shall assume, for all the purposes of this case, that the agent departed from his instructions in taking a risk at Utica. This hypothesis will not aid the defendants. Hayner was a general agent for effecting insurances in behalf of the company, and acted within the general scope of his authority in taking this risk. Although he must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons, dealing with him in good faith, are concerned. The question is not so much what authority the agent had in point of fact, as it is what powers third persons had a right to suppose he possessed, judging from his acts and the acts of his principals. *Perkins v. Wash. Ins. Co.* 4 Cowen, 645. This rule is necessary to prevent fraud and encourage confidence in dealing. 2 Kent's Comm. 620. It is difficult to conceive how the defendants could have conferred a more unlimited authority upon the agent, so far as third persons are concerned, than they did by furnishing him with policies already executed by the officers of the company, and ready

to be delivered to any one who might wish to contract, after his name, the subject insured, extent of the risk, and date of the transaction, had been inserted in the contract. The plaintiff had a right to believe that the defendants reposed unlimited confidence in Hayner, in relation to the subject of his agency; and it would be a monstrous doctrine to hold that they may now discharge themselves by setting up their private instructions, which were wholly unknown to the plaintiff when he entered into the contract. The rule is different in relation to a special agent; he cannot bind his principal beyond the precise limit of his authority. But Hayner was a general agent, acting within the scope of his powers; and if he was wrong in taking this risk, that is a question to be settled between him and his principals.

The objection that this was a special risk, and that Hayner had no authority to take special risks without consulting the company, depends on the same principle as the objection already noticed, and requires no separate consideration.

There is no ground for imputing bad faith to the plaintiff, or to his agent, Knowlton, who negotiated the contract with Hayner. So far as appears, the plaintiff did not know that the defendants had an agent in Utica; and if he had known that fact, he did not instruct his agent at Troy to insure with the defendants. Knowlton called on Hayner because he saw from the sign on his door that he was an agent for making insurance. He asked Hayner if he had authority to take risks in Utica, and the agent answered he thought he had. There was nothing in this calculated to excite a doubt concerning the extent of the agent's powers; and besides, the counsel did not suggest on the trial, as they did on the argument, that there was enough to put Knowlton upon inquiry. It is too late now to raise that question, if there was ever any ground for making it. The offer to prove that risks in the plaintiff's block were very hazardous, was of no manner of consequence, so long as there was no pretence that the plaintiff had either misrepresented the true character of the risk, or omitted anything which should have been stated in the survey on which the defendants acted. Nor was it a matter of any moment that the defendant's agents at Utica had refused to take risks in that block, and would have

refused this risk had it been offered to them. That fact could prove nothing against the plaintiff. And had the plaintiff known that R. & S., the agents at Utica, had refused to insure other buildings in the same block, which is more than the defendants offered to prove, that would not alter the case. Because other persons could not obtain an insurance, it did not follow that the plaintiff could not; and if the plaintiff himself had been refused by one agent or company, it did not preclude him from applying to another. If he was chargeable with no concealment or misrepresentation, affecting the contract which was made, it cannot be avoided on the ground that one, or even a dozen other persons, had refused to make a similar contract with him.

The defendants did not avow on the trial that they intended to impute fraud on the plaintiff; but if they had done so, the several offers of evidence did not go far enough to raise such a question.

If the policy was well delivered, it took effect by relation from the day of its date, which was the day on which the premium was paid, and the contract concluded. *Jackson v. Ramsey*, 3 Cowen, 75, and cases cited. It was the manifest intent of the parties that the contract should operate from the day of its date, so as to give the plaintiff the same legal remedy which he would have had if the policy had in fact been delivered on that day; and the law will give effect to that intention. This doctrine was not directly denied on the argument; but it was said that the policy was not duly delivered on the 21st April, for the double reason that the power of the agent was then at an end, and the plaintiff had notice that the defendants refused to ratify or be bound by his act in making the contract. Although the defendants told the plaintiff on the 21st of April that the authority of Hayner had been revoked, the letter of revocation was not even written until the next day, and it was not received by Hayner until the 23d of April. So far as the agent was concerned, he not only pursued his authority in delivering the policy, but he acted in perfect good faith towards his principals, for he had no notice that they intended to put an end to his agency. The delivery was well made and bound the defendants, unless there was something in the circumstances

of the case which should have precluded the plaintiff from receiving the policy when it was offered to him.

How does the question stand in relation to the plaintiff? He had, as we have already seen, made a valid contract with the defendants, and was entitled to the usual evidence of that contract — a policy of insurance. He could, I think, have maintained an action on the case against the defendants for a refusal to deliver the policy, in which he would have recovered damages to the full amount of his loss. But if his remedy at law was questionable, he had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper forum. *Perkins v. Washington Ins. Co.* 4 Cowen, 645. Having this equitable right to the policy, he was clearly at liberty to receive it, when voluntarily tendered him by one who had authority to deliver it. It would be a refinement in law, if not in ethics, to hold a man precluded from accepting that which was rightfully his due, because he happened to know that the debtor did not intend to discharge his obligation.

The plaintiff was not told that the authority of Hayner had been, or would be revoked, until his second call at the defendants' office on the 21st of April, and, for aught that appears, the policy had then been delivered. But suppose the delivery was after the second call. The plaintiff was not chargeable with notice that the powers of the agent had been revoked, for such was not the fact. The defendants can claim nothing on the ground of having given information which was untrue. The only notice, then, which could properly be imputed to the plaintiff, was notice that the defendants intended to revoke the powers of the agent. Immediately afterward, if it had not happened before, Hayner met the plaintiff, in pursuance of the appointment previously made at Troy, and delivered the policy. There was no false suggestion or deceit on the part of the plaintiff; he neither said nor did anything to induce the delivery. The matter then comes to this: The plaintiff accepted that which was voluntarily tendered, and was his rightful due, with the knowledge that his debtor did not intend he should have it. That cannot be a good impeachment of his title.

Although the plaintiff could not sue on the receipt for premium, that paper was properly received in evidence as a part

 Notice of Loss. — Alienation. — Conditional Delivery.

of the transaction. The objection to reading the policy in evidence is disposed of in what has already been said; and so also with the objection that the preliminary proofs showed a loss accruing previous to the execution and delivery of the policy. There are, I believe, no other exceptions which were not abandoned on the argument. *New trial denied.*

See *Stephenson v. N. Y. & Harlem R. American Ins. Co.* 3 Woodb. & M. 529 R. Co. 2 Duer, 348 (1853), where the (1847); *Gloucester Man. Co. v. Howard* ground of this decision is stated. See *Fire Ins. Co.* 5 Gray, 497 (1855); *Bebee* also *New York Central Insurance Co. v. v. Hartford Mut. Ins. Co.* 25 Conn. 51 *National Protection Ins. Co.* 20 Barb. (1856). 476 (1855); 4 Kernan, 85 (1856); *Nicol v.*

 GILBERT vs. THE NORTH AMERICAN FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1840.)

Notice of Loss. — Alienation. — Conditional Delivery.

In an action on a policy of insurance against fire, the plaintiff on the trial must show that he had an insurable interest in the premises; but it is not necessary in the account of loss furnished as a part of the preliminary proofs, to state the nature of his interest, if the conditions of insurance do not require it.

Under a policy requiring the insured to deliver a particular account of his loss, his affidavit that the mill which belonged to him, and which was insured, was, on a specified day, totally destroyed by fire, and that his loss and damage, by reason of the fire, would exceed \$10,000, was held a full and fair compliance.

It is not an alienation of property for the insured to make a deed thereof, and hand it to the grantee to be by him deposited with a third person, who was to hold it until a certain contingency, before final delivery to the grantee; although the grantee wrongfully puts the deed on record.

This action was tried at the Oswego circuit, in December, 1838, before the Honorable Philo Gridley, one of the circuit judges.

The defendants, on the 7th December, 1836, entered into a policy of insurance against fire, to the amount of \$4,000, upon a stone flouring mill, and a framed warehouse attached thereto, belonging to the plaintiff, situate at Oswego, for one year from the date of the policy. The mill took fire on the 23d October,

¹ 23 Wendell, 43.

1837, and was injured to a great amount. The first objection taken to a recovery was an alleged defect in the preliminary proofs; the defendants insisting that the plaintiff should have stated his interest in the premises at the time of the insurance, and at the time of the loss. The account, or rather affidavits, of the loss made by the plaintiff, commenced as follows: "H. S. G. deposes that the flouring mill which belonged to him, in the village of Oswego, and which was insured by, &c., was, on, &c., totally destroyed by fire," &c. This objection was overruled by the circuit judge. The defendants next undertook to show that the plaintiff had, without their assent, parted with his interest in the premises insured; and they accordingly produced in evidence a deed in fee, bearing date 19th May, 1837, whereby the plaintiff, for the consideration of \$16,000, conveyed the property to one Jeremiah Nottingham. The grantee in that deed, being called by the plaintiff, testified that he entered into a contract with the plaintiff for the purchase of the premises; that it was agreed that the plaintiff should execute a deed to him, and that he (the witness) should execute a mortgage back to secure the payment of \$11,000; and as to the residue of the purchase money, viz: \$5,000, that it should remain open until the close of a controversy between the plaintiff and one White, the grantor of the plaintiff, in respect to incumbrances charged upon the property; that the deed and mortgage should be placed in the hands of Mr. Babcock, of Oswego, to be retained by him until the settlement of the controversy between the plaintiff and White, and then to be delivered over and take effect. The deed and mortgage were accordingly executed, and were both left in the hands of a witness to forward to Mr. Babcock. He subsequently explained that the understanding was, that the deed should be transmitted to the clerk's office of Oswego, to be recorded, and then handed over to Mr. Babcock, to remain until, &c. He accordingly sent the deed to the clerk's office, and the mortgage to Mr. Babcock, in whose hands both the deed and mortgage now remain; the witness testifying that he had never accepted or received the deed. The deed and mortgage were recorded on the same day. The defendants also gave in evidence a deed of assignment, bearing date 5th July, 1837, exe-

cuted by the plaintiff to one William P. Nottingham, in trust, for the payment of certain debts, whereby the plaintiff granted all his real estate, a schedule whereof was declared to be annexed. On production of the schedule it was manifest that the property at Oswego was not embraced in the assignment. Upon this evidence the counsel for the defendants moved for a nonsuit, which being refused, an exception was taken, and the jury, under the charge of the judge, found a verdict for the plaintiff. The defendants ask for a new trial.

W. C. Noyes, for the defendants.

W. Duer & B. Davis Noxon, for the plaintiff.

By the Court, BRONSON, J. It was necessary for the plaintiff to establish on the trial his interest in the subject insured; but I find nothing in the ninth condition annexed to the policy which made it necessary for him to state the nature of his interest in the affidavit, which formed a part of the preliminary proofs. He was to deliver a particular account of his loss, and accompany the same with his oath. He stated in his affidavit, that the flouring mill which belonged to him, and which was insured, was, on a specified day, totally destroyed by fire, and that his loss and damage, by reason of the fire, would exceed ten thousand dollars. This seems to be a full and fair compliance with that part of the ninth condition which relates to this question, and I think no criticism upon the words of the affidavit would have been attempted, had it not been for the question which arose concerning the conveyance of the property before the loss happened. That question remains to be considered by itself. The objection to the preliminary proofs was properly overruled.

There is no foundation for the objection, that the plaintiff's interest in the mill passed by the trust deed to William P. Nottingham. The general words, "all my real estate," were plainly qualified and restricted in their operation, by the reference which immediately followed to "a schedule," in which two parcels of land were particularly described, and the Oswego property was not mentioned. It would be doing violence to the plain intent of the parties to say that the mill passed by that deed.

The deed of May 19, 1837, to Jeremiah Nottingham, presents

a more important, though not a very difficult question. If the grantor do not intend that his deed shall take effect until some condition is performed, or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time. If he deliver it as his deed to the grantee, it will operate immediately, and without any reference to the performance of the condition, although such a result may be contrary to the express stipulation of the parties at the time of the delivery. This is one of the cases, in which the law fails to give effect to the honest intention of the parties, for the reason that they have not adopted the proper legal means of accomplishing their object.

But this case does not come within the rule. There was no delivery of the deed, either upon condition, or otherwise, to the grantee. The agreement of the parties was, in substance, that the deed should be placed in the hands of Mr. Babcock, until the controversy with White should be settled, and then, and not before, the conveyances should be delivered. It was not necessary that the word escrow should be used in making this arrangement. The intention of the parties was sufficiently manifested without it. *Clark v. Gifford*, 10 Wendell, 310. If Babcock had been present, and the conveyances had been handed to him at that time, there would have been no question about it; and although absent, if the deed had been sent to him, with the proper instructions, by the hand of a third person, it could not be maintained that this would amount to a delivery to the grantee.

Now, what was done in this case? The deed, as well as the mortgage, was left in the hands of Nottingham to be forwarded to Babcock, the depositary. It was not put into the hands of the grantee to keep, but merely as a mode of transmission to Babcock, as was well said by the judge on the trial. There was neither any formal delivery nor any intent that the grantee should take it as the deed of the grantor. Nottingham received it, not as grantee, but as the agent of the grantor for a special purpose; and I see no good reason why he could not execute that trust as well as a stranger. He did execute it with fidelity, and the deed still remains with the depositary agreed on by the parties.

Concealment. — Waiver of. — Receipt of Premium.

The fact that the deed had been recorded was only *prima facie* evidence of a delivery, which might be rebutted. *Jackson v. Perkins*, 2 Wendell, 308. What would have been the consequence had Nottingham conveyed to a *bona fide* purchaser, need not be considered on this occasion.

New trial denied.

ALLEN, SAFFORD & COMPANY vs. THE VERMONT MUTUAL FIRE
INSURANCE COMPANY.¹

(Supreme Court, Vermont, February Term, 1840.)

Concealment. — Waiver of. — Receipt of Premium.

If a policy of insurance, executed by a mutual fire insurance company, is obtained upon the suppression of a fact material to the risk, a subsequent reception by the company of an instalment on the premium note of the insured, does not render the policy binding upon the company, where neither the company nor their agent have notice of the existence of the fact suppressed.

ASSUMPSIT on a policy of insurance, to recover damages for the destruction of the plaintiffs' cotton factory by fire.

Plea, non assumpsit. Issue to the country.

Upon the trial in the county court, the plaintiffs gave in evidence their application, made in writing, to the defendants, for an insurance upon their cotton factory, in which application the dimensions of the factory building, materials of which it was built, number of stoves used, &c., were particularly described; but the application did not contain any description or statement of an apparatus for manufacturing sizing, erected in said factory building.

The application was signed by Allen, Safford & Co., and countersigned by J. N. Hinsdale, agent of said insurance company. The plaintiffs also gave in evidence the policy of insurance declared upon, in which reference was made to the plaintiffs' application for a more particular description of the property insured, and as forming a part of said policy.

It was admitted that there was, at the time of said application, and continued to be to the time of the destruction of

¹ 12 Vermont, 366.

said building by fire, an apparatus in the fourth story of said building, consisting of a kettle set in brick work over an arch, in which fire was used for the purpose of generating steam for the manufacture of sizing, which apparatus was used for that purpose during the period above mentioned, sometimes once, and sometimes twice in a week, from one to two hours at each time, and, on one occasion, viz: on the day preceding the fire, it was used once or twice in the course of the day; that the plaintiffs made the sizing in the afternoon of that day; that such sizing was an indispensable article in manufacturing cotton cloth, and that such an apparatus for making it, in factories of the size of the plaintiffs', was usually placed, with the dresser, in such part of the factory building as convenience required.

On this point the defendants insisted, and requested the court to charge the jury, that the omission, on the part of the plaintiffs, to disclose the existence of the sizing apparatus did, in law, make the contract of insurance void; but the court decided and charged the jury that such an omission did not vitiate or make void the contract, unless the existence of said apparatus was, in the opinion of the jury, material to the risk.

Testimony was introduced, on the part of the plaintiffs, tending to show that the risk was not enhanced by said apparatus, and, on the part of the defendants, testimony was introduced tending to show that the destruction of the factory by fire was caused by the use of said apparatus on the day previous to its destruction.

The plaintiffs also offered in evidence the vote of the directors of said company, passed on the second day of February, 1836, which was objected to by the defendants, and admitted by the court, which vote is as follows:—

“Voted: That a member be appointed to go and examine the loss at Bennington, and to examine the factories as to their safety and internal construction. Thomas Reed, Jr., appointed.”

The plaintiffs also introduced testimony tending to show that the person so appointed, in pursuance of said vote, visited Bennington, and examined the factories there, and

that, subsequently, the defendants received of the plaintiffs an instalment or call of forty-four dollars on the policy in question. This testimony was objected to by the defendants, but admitted by the court.

The destruction of the factory by fire, during the term of the policy, was admitted, and the amount of the loss was agreed upon by the parties.

In relation to the vote of February 2, 1836, and of the proceedings of the agent under it, the court charged the jury that if the agent of the company, in pursuance of such vote, went to the factory in question, and the company afterwards received the instalment of forty-four dollars, the defendants were liable in this action, although the jury might believe that the sizing apparatus was material to the risk, and had been omitted in the application.

The jury returned a verdict for the plaintiffs, and the defendants excepted.

Other important questions than those above stated were presented in the bill of exceptions, but as they were not decided by this court, they are omitted in the statement of the case.

A. Spaulding, for defendants.

J. S. Robinson & W. S. Southworth, for plaintiffs.

S. S. Phelps, for defendant, in reply.

The opinion of the court was delivered by

BENNETT, J. This case involves several important questions, and some of them are not without considerable difficulty. It has been argued at great length and with much ability; but, from the shortness of the time allowed us for an examination, we are not prepared, at this time, to come to a conclusion on all the questions which the case presents. There is, however, one point upon which the court are all satisfied that the defendants must have a new trial, and we are, therefore, induced to decide the case on that single point, leaving all other questions open. It seems, after this policy had been executed, and after the company had sustained a loss on some other factory insured by them at Bennington, the company passed a vote directing that a member of the company should be appointed to go and examine the loss at Bennington, and also examine the factories as to their safety and internal construction; and Thomas Reed

was, on the second day of February, 1836, appointed to perform this duty. It appears, also, that evidence was given to the jury tending to prove that, in pursuance of said vote, an agent of the company visited Bennington and examined the factories there, and that subsequently the company received of the plaintiffs an instalment of forty-four dollars on the policy in question. On this part of the case, the jury were told that if they found that the agent of the company went *in pursuance of the vote of the company to the factory in question*, and the company afterwards received the instalment, the defendants were liable on the policy of insurance, although they should find that the sizing apparatus was material to the risk, and had been omitted in the application. This was evidently incorrect.

The vote of the company did not contemplate that the agent should examine the factories "as to their safety and internal construction" with a view of comparing them with the applications, in order to enable the company to decide whether any of the policies were fraudulent. The object seemed to be to make a general examination of them, and there is no evidence that the agent even knew what the representation was, as specified in the application, upon which the policy in question was executed. There is no evidence that the agent ever saw, or had any knowledge of the existence of, the sizing apparatus. The jury were not, by the instructions given them, required to find such knowledge. The court say, if the agent, in pursuance of the vote of the company, went to the factory in question, and the company afterwards received the instalment, it is sufficient. It is not necessary to decide whether, if this policy was obtained through the fraudulent suppression of what was material to the risk, it was competent for the company to waive the objection by subsequent matter, so as to render valid the policy. If the agent had been clothed with power to examine as to the validity of the policy, it is clear that the reception of a subsequent instalment could not operate as a waiver of such suppression, unless the agent had knowledge, at the time of the payment, of the fact suppressed. This knowledge the jury should, at least, have been told they must find, before they could give any effect to the reception of the instalment. On this ground, then, the judgment of the county court must be reversed, and the cause remanded for a new trial.

McLAUGHLIN vs. THE WASHINGTON COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1840.)

Notice of Loss. — Interest. — Remittitur.

The condition of a policy of insurance requiring an account of loss is always liberally construed in favor of the assured.

Where there is no doubt as to the amount of the loss, interest is allowed from the time specified in the policy; but where the preliminary proofs are indefinite in this particular, interest is not allowed.

Where interest is properly allowed, the verdict will not for that cause be set aside, but the plaintiff will be allowed to remit.

THIS was an action on a policy of insurance, tried at the Washington circuit in June, 1838, before the Hon. John Willard, one of the circuit judges.

The defendants insured the plaintiff against loss or damage by fire, to the amount of \$1,000 on a frame store, and \$300 on goods contained therein for the term of six years, from 3rd October, 1836. The store and the goods were consumed by fire 29th April, 1837. The plaintiff transmitted to the secretary of the company an account of the loss verified by his oath in these words, "I hereby forward to you an estimate of my loss by fire, as correct as I can come at the same, viz: amount of merchandise on hand when said fire occurred, was \$1,497.87; amount of goods saved, \$605.29, which are supposed to be damaged in part, \$54.67; clothing consumed, \$53; amount of produce, \$19; thirty half barrels, \$4, (total) \$1,639.54. Deduct amount of goods saved, \$605.25, (leaves) \$1,034.07. Whole amount of loss as near as we can estimate same. There was no other insurance on store nor merchandise. The store was totally destroyed." The value of the store was proved to be \$700, and a clerk of the plaintiff testified to the value of the goods destroyed, and that the books, notes, and vouchers were pretty much destroyed.

The counsel for the defendants moved for a nonsuit on the ground of the insufficiency of the account of loss furnished by

¹ 23 Wendell, 525.

Notice of Loss. — Interest. — Remittitur.

the plaintiff according to the requirements of the fourth condition annexed to the policy which is in these words. "IV. All persons insured by this company, and sustaining loss or damage by fire, shall forthwith give notice thereof to the secretary, and within thirty days after said loss deliver a particular account of such loss or damage to the secretary, verified on oath or affirmation; and also, if required, by their books of account and other proper vouchers. They shall also declare on oath, whether any and what other insurance has been made on the same property. If there be any fraud or false swearing, the claimant shall forfeit all claim by virtue of his policy." The judge overruled the motion for a nonsuit. After evidence on the part of the defendants, as to the value of the goods, the judge submitted the case to the jury, instructing them, if they found for the plaintiff, to allow him interest upon such sum as they should find the amount of the loss to be, after four months from the time of the presentation of the account of the loss. The jury found a verdict for the plaintiff for \$1,000, with the interest thereof, after the expiration of four months, &c. The defendants moved for a new trial.

B. F. Agan, for the defendants, insisted that the plaintiff should have been nonsuited for the insufficiency of the account of loss. The condition referred to in the policy, requiring that the assured shall deliver a particular account of his loss, cannot be held satisfied by a general statement of amount of goods on hand, without specifying kind, quantity, and quality. Besides, the account was unliquidated, and interest should not have been allowed.

W. Hay, for the plaintiff, argued that the preliminary proofs not having been objected to when presented, could not be objected to at the trial; and if the interest should be held improperly allowed, it may be remitted, and the verdict stand for the \$1,000 only.

By the Court, NELSON, C. J. By the fourth condition of the policy, the assured is required forthwith to give notice of the loss, and within thirty days to deliver a particular account of the same to the secretary, verified by oath, and also if requested, the books of account and other papers, &c. This condition is

substantially like that of the insurance company passed upon by this court in 7 Cowen, 645,¹ that required "as particular an account as the nature of the case would admit."

The one here requires no more — and the account rendered in that case is not more particular than that furnished here. This clause has always been construed with great liberality, as the party must necessarily often make out the account under embarrassment arising from loss of books, bills, parcels, &c. The clause requires only reasonable information to be given, so that the company may be enabled to form some estimate of their rights and duties, before they are obliged to pay. 11 Johns. R. 260.

The defendants were bound by the policy to pay the loss within four months after the presentation of the preliminary proofs. The learned judge ruled at the circuit, that the plaintiff was entitled to interest from that time. It is said in an anonymous case (1 Johns. R. 315) that the general rule is, that interest is not recoverable upon unliquidated damages, or for an uncertain demand; but that jurors in many cases have a discretion to allow interest by way of damages, according to the circumstances of the case, and that they might exercise that discretion in an action on a policy, to recover a partial loss. Interest was also allowed in *Delonguemare v. Traders' Insurance Company*, 2 Hall's R. 589.² There was no dispute in the case, but that the loss exceeded the amount covered by the policy. In the case of *Bridge v. Niagara Insurance Company*, 1 Hall, 261, it was refused, on the ground that the defendants were not able to make up the amount of the loss (it being a partial one) from the proofs furnished them, and therefore, could not ascertain the sum to be paid; and that where the preliminary proofs were so defective as to the amount of the loss, it would be inequitable to charge the defendants with interest. It appears to me this is a sound view of the question, and should govern the case before us. The preliminary proofs as to the amount of loss were confessedly loose and indefinite; and though it has been a total one according to the verdict, I should have thought otherwise upon the proof.

The plaintiff has proposed to strike from the verdict the

¹ *Ante*, vol. 1, p. 204.

² *Ante*, vol. 1, p. 289.

Right to replace. — Election. — Injunction.

interest, if the court should be against him. Let it stand at the \$1,000. *New trial denied.*

As to the allowance of interest, see *Wolf v. Goodhue Fire Insurance Company*, 43 Barb. 406 (1864). In *Dana v. Fiedler*, 1 E. D. Smith, 482 (1852), it was held to be a question for the jury whether interest should be recovered upon unliquidated damages.

THE NEW YORK FIRE INSURANCE COMPANY vs. DELAVAN.¹

(Court of Chancery, New York, July 21, 1840.)

Right to replace. — Election. — Injunction.

Where by the terms of a policy of insurance the insurers are authorized, within twenty days after proof of loss, to elect to replace the articles lost or damaged by the fire, they are not entitled to file a bill for an injunction, to restrain the assured from removing or disposing of his goods until after the expiration of the twenty days ; to enable them to take an inventory &c., with a view to such election. But, upon such a policy, if the assured should, without any sufficient excuse, refuse to permit the insurers to make an examination of the goods saved from the fire, and a proper scrutiny as to the alleged loss, it would be proper evidence to submit to a jury, in a suit brought upon the policy ; and it would authorize the jury to presume that the statement of the loss was false and fraudulent.

THIS was an appeal from a decree of the vice-chancellor of the first circuit, dissolving the injunction which had been issued in this cause, and dismissing the complainants' bill with costs. The complainants had insured the defendant upon his stock of hardware, in a store in New York, to the amount of \$5,000, which stock was injured by fire, and by the water used in extinguishing the fire, to the extent of about \$2,200, as the defendant claimed by his statement of the loss, furnished to the insurers according to the terms of the policy. The bill alleged that the complainants verily believed that the loss had been over-estimated, and that they had therefore been anxious to obtain a statement of the present condition of the stock, in order to make a correct estimate of the damage sustained ; that, after several interviews with the defendant, he agreed that the stock should be examined in the presence of two gentlemen, selected by him and the underwriters for that purpose ; but that before such

¹ 8 Paige, 419.

examination was had, the defendant removed a part of his stock of goods to the store of an auctioneer, for sale at auction, and that he was engaged in removing the remainder for that purpose at the time of the filing of the bill in this cause; that the secretary of the complainants' company objected to such removal, and insisted upon their right to take an inventory of the stock, and to make an estimate of its present condition; that the terms of the policy 'authorized the insurers, if they should see fit, to elect, within twenty days after the furnishing of the preliminary proofs of loss, to replace the articles lost or damaged with others of the same kind and of equal goodness as such articles were before the fire; and that the twenty days allowed them for that purpose had not yet expired. The complainants therefore prayed for an injunction to restrain the defendant from removing his goods from the store in which they were at the time of the fire, until they should have had a reasonable time to take such inventory, and until the expiration of the twenty days; and that the defendant might be compelled to permit the complainants to take such inventory, and for general relief. The defendant, in his answer, stated the reasons why the parties had not been able to agree upon the mode of estimating the damage to the goods, and why he did not consent to stay the removal of the stock to the store of the auctioneer; but denied that he had refused to permit the complainants to examine and take an inventory of the stock on hand subsequent to the fire, after the goods were thus removed, and as fast as they were removed; so as not to interfere with the taking of his own inventory. He also denied the right of the insurers to take an inventory of the stock, except by his voluntary consent, other than the particulars of his loss, which by the terms of the policy he was bound to furnish; and which he was engaged in making at the time of the filing of the bill. The defendant therefore objected to the jurisdiction of the court to grant any relief in the case.

P. A. Cowdrey, for the complainants. Pursuant to the tenth condition of the policy of insurance, it was optional with the complainants to replace the articles damaged with others of the same kind and of equal goodness, giving notice of their intention to do so within twenty days after having received the preliminary proofs.

This gave to the complainants a qualified right of property in the damaged goods; at all events, until the expiration of the twenty days, which had not elapsed when the bill was filed, and the injunction granted. The amount of damage to the goods insured was the subject of dispute between the parties, and the complainants had an equitable right to a discovery of such amount of damage from the inspection of the goods themselves; which could alone furnish the correct evidence. The jurisdiction of the court of chancery is in this respect ancillary to the powers of the courts of law, and which without such aid would be defective.

L. H. Sanford, for the defendant. We hold this demand of the complainants to take possession of a man's store and damaged stock of goods to be the only instance on record, in the history of insurances against fire, where such a right has been asserted to exist. The bill is not intended to be in aid of a suit at law. This court can only deal with the contract the parties have made. The contract of insurance is one of indemnity merely, and the underwriters can only be charged with the amount of loss sustained. Proof of loss is made a condition precedent; and until made, no claim arises. When it is made in pursuance of the conditions of the policy, a claim does arise; and we respectfully deny any power or jurisdiction of this court in any manner to interfere with the collection or adjustment of that claim. 2 John. Ch. Rep. 371. The remedy is wholly and exclusively at law. Courts of law decide upon the sufficiency of the proofs, and if erroneously, the constitution has provided another tribunal than the court of chancery to correct their decisions. *Haff v. The Marine Ins. Co.* 4 John. R. 132; 9 Id. 192; 11 Id. 241. 12 Wendell, 452. 6 Paige's R. 583. 1 H. Black. 577; Id. 254; 2 Id. 574. 6 Term. R. 200. 16 Wendell, 385. 6 Term. R. 710. The injunction in this cause should be dissolved, and the bill of complaint dismissed with costs.

THE CHANCELLOR. I have not been able to find any precedent for a bill of this kind, and I am not aware of any principle upon which it can be sustained. It is in effect an application to restrain the defendant from removing or disposing of his stock in trade, or that part of it which has been saved from the fire,

until the determination of a chancery suit, and after a decree shall have been obtained therein to compel him to furnish the insurers with an opportunity of examining the goods saved, to obtain testimony to contradict the defendant's statement, and proof of loss. This would indeed be carrying the jurisdiction of this court much farther than it has ever yet been extended; and in a case where it does not appear necessary for the attainment of justice. The defendant himself is by the terms of the policy bound to furnish a particular statement of his loss, not only for the purpose of enabling the insurers to test its correctness by the testimony of witnesses, and a resort to his books, but also to enable them to substitute other articles in the place of those which are damaged or lost, if they shall elect to do so. And in case the assured, without any reasonable excuse, refuses to permit a proper scrutiny as to the loss, by an examination of the goods remaining on hand, or otherwise, the insurers will have the full benefit of the presumption of fraud and unfairness in his statement of the loss before the jury which tries the cause. Here I think also that the answer furnishes a sufficient excuse for the refusal to postpone the defendant's own inventory and statement of the particulars of the loss; and no reason is stated in the bill why the complainants' agent or witness could not have examined the goods at the store of the auctioneer, to which they were being removed at the time the defendant consented to have them examined there.

As the court was not authorized to give any relief to the complainants, upon the case as made by their bill, the injunction, which was merely incidental to the relief prayed for, ought never to have been granted. The decree of the vice-chancellor was therefore right, and the same must be affirmed with costs.

WOOD & another vs. THE HARTFORD FIRE INSURANCE COMPANY.¹

(Supreme Court, Connecticut, July Term, 1840).

Warranty. — Use of Property. — Hazardous Trades.

An insurance was effected on an undivided half of a paper-mill, and of the machinery therein. Afterwards the rag-cutter and duster were displaced, and a pair of millstones for grinding grain were substituted, but the building and machinery in other respects remained unchanged. The fire arose from a cause other than the change in occupation. The policy contained a description of risks in classes denominated hazardous, extra hazardous, and those mentioned in a memorandum, which would be insured at special rates, and in this memorandum were mentioned grist-mills and paper-mills.

It also contained a condition that the insurance should be void if the building insured should be put to a use denominated hazardous or extra hazardous:

Held, 1st, That the contract amounted to a warranty that the building should continue to be a paper-mill, but that by the introduction of the millstones the character of the building was not changed; it was a paper-mill still.

2d, That, admitting the use of the millstones to have increased the risk, as the policy had expressly provided that putting the building to a use denominated hazardous or extra hazardous should avoid the insurance, and had not provided for any such consequences, when the building is put to a use described in said memorandum, it could not have been the intent of the contract that use of the building for the purposes mentioned in the memorandum should affect its validity; and as the fire in this case arose from a cause within the risk as originally taken, assured was entitled to recover.

The case sufficiently appears from the opinion.

Baldwin & Kimberly, for the plaintiffs.

Bissell & Hungerford, for the defendants.

SHERMAN, J. It is not necessary to advert to all the points which have been discussed in this case by the learned counsel. The general rule in regard to what constitutes a warranty, in a contract of insurance, is well settled. Any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty. Whether this is declared to be a warranty *totidem verbis*, or is ascertained to be such, by construction, is immaterial. In either case, it is an *express* warranty, and a condition precedent. If a house be insured against fire, and is described in the policy as being "copper roofed," it is as express a warranty as if the language had been, "Warranted to be copper roofed;" and its truth is as essential to the obligation of the policy in one case as in the other. In either case, it must be strictly observed. There may often be

¹ 13 Conn. 533.

much difficulty in ascertaining from the construction of the policy, whether a fact, quality, or circumstance specified relates to the risk, or is inserted for some other purpose — as to show the identity of the article insured, &c. This must be settled before the rule can be applied. But when it is once ascertained that it relates to the risk, and was inserted in reference to that, it must be strictly observed and kept, or the insurance is void. The word “warranted” dispels all ambiguity, and supersedes the necessity of construction. If a house be insured against fire, and the language of the policy is, “Warranted, during the policy, to be covered with thatch,” the insurer will be discharged, if, during the insurance, the house should be covered with wood or metal, although his risk is diminished; for a warranty excludes all argument in regard to its reasonableness, or the probable intent of the parties.

“It is quite immaterial,” says Marshall, [on Insurance, 249,] “for what purpose, or with what view it is made; or whether the assured had any view at all in making it: unless he can show that it has been literally fulfilled, he can derive no benefit from the policy.” And he adds, [page 251,] that “it is also immaterial to what cause the non-compliance is attributable; for if it be not in fact complied with, though perhaps, for the best reasons, the policy is void.” These positions are in conformity with numerous and high authorities, and with the reason of the rule. Parties may contract as they please. When a condition precedent is adopted, the court cannot inquire as to its wisdom or folly, but must exact its strict observance. An entry on the margin of the policy, or across the lines, or on a separate paper, expressly referred to in the policy will be construed a warranty, if it relates to the risk; that is, if it defines, or, in any respect, limits the risk assumed. It may indeed, where the explicit language of a warranty is not adopted, be difficult to ascertain whether, on a fair construction, the clause was meant to define or limit a risk; but when this is ascertained, the insured has no right to dispense with it, or substitute in its place another risk, however advantageous to the insurer. No man can be compelled to adopt a better bargain than his own.

It is immaterial whether the non-performance or violation of the warranty be with, or without, the consent or fault of the in-

sured. Its strict observance is exacted by law; and no reason or necessity will dispense with it.

The argument of the defendants is therefore conclusive, if the policy warrants this building to be and continue a paper-mill, and it was not one at the time of the loss.

In the policy, this establishment is described as "the one undivided half of the paper-mill, which they [the insured] own at Westville, together with the half of the machinery, wheels, gearing, &c.; the other half being owned by William Buddington." If this relates to the risk, it is a warranty. That it does, is evident from the memorandum in the conditions of the policy, where "paper-mills" are enumerated among those articles which "will be insured at special rates of premium;" that is, a paper-mill is the subject of peculiar risks, and is to be insured upon special stipulations. Therefore, the description of this in the policy as a "paper-mill," relates to the risk, and is, consequently, a warranty. It is the only subject of insurance; and if it was not a paper-mill at the time of the loss, the warranty was not kept, and the plaintiffs cannot recover, although the change may have diminished the hazard, and been effected without their knowledge, or against their will.

It is contended, that the paper-mill had become converted into a grist-mill. The policy is dated in February, 1837. In the August following, the use of the paper-mill was discontinued, and a pair of millstones were added, for grinding grain. They were located in the place previously occupied by the rag-cutter and duster; and were moved by the same gearing, and by the power of the same water-wheel. No other machinery was used for the grindstones. All remained as it was, except the rag-cutter and duster, — which were dismantled, — and all the other machinery might, at any time, have been employed in making paper. It was, to all intents and purposes, a paper-mill ready for use. The character of the establishment was no more altered, than if a grindstone had been attached, by a band, to the water-wheel, and all the other machinery left at rest. The warranty was duly kept.

It has been further contended, that the defendants are absolved from their obligations, by reason of the increased hazard resulting from the use of the millstones. In most cases of in-

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insurance, circumstances occur which increase the hazard; but whether they impair the policy must depend on its construction, or on the general principles of the law of insurance. The jury have found, that by the use of the millstones the risk is greater than it would have been if no use were made of the premises, but no greater than if the paper-mill only was in full operation; but that they were not the cause of the loss. Admitting that, as the facts were, the hazard was increased by the use of the millstones; yet, to this claim of the defendants, the policy itself furnishes a satisfactory answer. It provides, that if, without the written agreement of the company, the building shall be appropriated for carrying on any trade, business, or vocation, or for the storing of any articles, "denominated hazardous or extra hazardous," in the annexed conditions, the insurance shall be of no effect, so long as the same shall be so appropriated. In the conditions annexed, grist-mills are not denominated hazardous or extra hazardous, but enumerated in the *memorandum* relating to special rates of premium. They were under the consideration of the parties, and advisedly omitted from that class, which should affect the validity of the insurance. An effect of the memorandum is, to exclude from insurance the articles which it embraces, unless specially provided for in the policy; but they are purposely distinguished from those which affect its validity.

It is admitted, that the loss has happened by the risk insured against; and that all the preliminary steps, to entitle the defendants to the benefit of the policy, have been taken.

The property insured has not been changed; the warranty has been kept; and the obligations of the defendants have not been impaired, by any increase of hazard, resulting from the alterations in the mill.

We advise that judgment be entered for the plaintiffs.

In this opinion the other judges concurred, except WILLIAMS, Ch. J., who gave no opinion, being nearly related to one of the stockholders in The Hartford Fire Insurance Company.

Judgment for plaintiffs.

See Glendale Manufacturing Co. v. The 20 Conn. 142 (1849); *Sheldon v. Hartford Protection Ins. Co.* 21 Conn. 34 (1851); *Fire Ins. Co.* 22 Conn. 235 (1853).
Billings v. Tolland Mut. Fire Ins. Co.

Sale of Property. — Assignment of Policy.

THE FIRE AND MARINE INSURANCE COMPANY OF WHEELING vs.
MORRISON.¹

(Court of Appeals, Virginia, August, 1840.)

Sale of Property. — Assignment of Policy.

An executory contract for the sale of the insured premises, not carried into effect at the time of the loss, though coupled with a parol agreement to assign the policy to the vendee, does not come within the clause forbidding assignments, and does not annul the policy, especially if by the contract of sale the vendor is to have a mortgage back from the vendee to secure the purchase money; although after the loss the contract of sale is carried into effect.

JOSEPH MORRISON brought an action on the case, in the circuit superior court of Ohio county, against the President and Directors of the Fire and Marine Insurance Company of Wheeling, to recover the value of a house insured by the plaintiff with the defendants, and subsequently consumed by fire. Issues being made up on the pleas of non assumpsit and payment, the parties stated and agreed the following case for the judgment of the court:

1. That on the 9th of August, 1832, the defendants executed to the plaintiff a policy of insurance for one year on a certain dwelling-house in Wheeling, and some furniture therein, which policy is agreed *in hæc verba*, and contains among others the following provisions: "That the capital stock, estate, and securities of the company shall be liable to pay, make good, and satisfy unto the said insured, his heirs, executors, administrators, or assigns, all such damage or loss which shall or may happen by fire to the house and furniture above mentioned," within the year, "not exceeding in the whole the sum of \$1,000, according to the amounts as above mentioned" (that is to say, \$500 for the house, and \$500 for the furniture), "unless the said company shall, within five days after the proof of such damage or loss of the building aforesaid insured, give directions for putting the same into as good a state of repair as the same was in before the injury by fire, or make good the loss or damage by paying therefor;" with a similar provision for replacing or paying for the furniture, in case of loss or injury by fire; that the damages should be paid according to an estimate to

¹ 11 Leigh, 354.

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be made by arbitrators indifferently chosen; that the house should not be occupied for certain purposes deemed hazardous; and that the policy should have no "force or effect if assigned, unless such assignment be made within thirty days after the transfer of the property, and allowed by the company agreeable to article ten of the proposals annexed;" which article is in these words: "The policy may always be transferred, provided such transfer be indorsed upon the policy, and brought to the office for approval within thirty days from the date thereof, otherwise the premium shall be considered as sunk for the benefit of the assurers."

2. That the policy was renewed from time to time until the 16th of March, 1836, when it was again renewed for one year from that date on the building alone, to the amount of \$700, at which time the plaintiff was seised of the premises in fee, and the house was worth \$700.

3. That the premiums of insurance were paid by the plaintiff to the defendants.

4. That on the 5th of May, 1836, the house was consumed by fire, without any fraud on the part of the plaintiff, who gave due notice and satisfactory proof thereof to the defendants, and performed all the conditions precedent which were incumbent on him.

5. That on the 11th of April, 1836, the plaintiff entered into an agreement under seal, with a certain Austin Peay, for the sale of the house insured, and the lot on which it stood, which agreement is set forth *in hæc verba*, and is to the following effect: That the plaintiff Morrison had sold to Peay the house and lot aforesaid, with other property, for which Peay had paid ten dollars in hand, and agreed to deliver to Morrison, duly transferred, the bond of John M. Clark for \$12,000, payable five years after the 1st of April, 1836, and bearing interest payable half yearly from its date, and also to invest Morrison with all the security attached to the bond aforesaid, and to give him, as additional security for the payment thereof, a mortgage upon two lots (one of them being that on which stood the building in question); all of which covenants on the part of Peay were to be done and performed in the same month of April; and that upon the delivery of the bond and security aforesaid

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Morrison was to execute and deliver to Peay a good and sufficient deed in fee simple, with general warranty.

6. That at the time when the house was consumed by fire, Clark, who had been absent for some time before, and continued absent for some time afterwards, had not executed the bond which was to be delivered in payment, and Peay had not complied with the terms of the said agreement; but that afterwards the said agreement was carried into effect by the assignment of Clark's bond, and the execution of a deed from Morrison to Peay, who had ever since been, and was still, in possession of the premises.

7. That at the time of the bargaining between Morrison and Peay for the said property, it was agreed by parol between them, that possession was to be delivered to Peay at the time Clark's bond should be assigned to Morrison, and that Peay was to receive the rents from the 1st of April, 1836, provided the contract on his part was carried into effect: that it was also agreed by parol between Peay and Morrison, both before and after the execution of the written agreement, that the policy of assurance was to be transferred and assigned by Morrison to Peay. But the question of law was reserved, whether the said parol contracts can be admitted, either as distinct, independent contracts between Morrison and Peay, or for the purpose of affecting in any way the terms of the said written agreement.

8. That no objection to the form of the action was to be taken: and if, upon the facts above stated, the law was for the plaintiff, judgment should be rendered in his favor for \$700, with interest from the 10th of May, 1836, till paid; and if the law was for the defendants, judgment should be rendered for them.

The circuit court held that the law upon the case agreed was for the plaintiff, and rendered judgment in his favor for the damages and interest agreed as aforesaid, and his costs of suit. To which judgment, on the petition of the defendants, a *supersedeas* was allowed.

Johnson, for the plaintiffs in error.

Price, for the defendant in error.

STANARD, J. In this case certain facts have been agreed

by the parties, and the law on those facts submitted to the court; the parties agreeing that if it be for the plaintiff, judgment shall be entered for a specified amount. The only question presented then is, Has the plaintiff, on the facts agreed, a right of action against the defendants? — the agreement of the parties as to the amount of damage precluding an inquiry by the court into that matter.

The original insurance is free from all exception, and the property embraced by it having been destroyed by the risk insured against, the right to the action is clear, unless the interest of the insured in the property had been extinguished at the time of the loss. It is said to be extinguished by the executory contract of sale made before the loss. That contract, if it had been carried into full execution according to its provisions, would have left the insured a mortgagee. The existence of that interest, of sufficient stability to sustain an original policy, is surely sufficient to repel the pretension that the interest was extinguished. If the contract executed would not extinguish the insurable interest, the contract executory surely would not. The interest so abiding in the insured would have entitled him to recover the full amount of the insurance on the loss, without subjecting him to a delay of his claim on the insurers, until he had shown, by the pursuit of the claim on the mortgagor, that it could not be recovered from him. *Stetson v. Massachusetts Fire Insurance Company*, 4 Mass. Rep. 330.

The mortgagee confessedly has an insurable interest, and yet it is nowhere intimated in any treatise or adjudication on the subject, that, in the event of destruction of the property, his claim on the policy must await the pursuit of his claim on the mortgagor.

A commission merchant, in the habit of making advances on consignment, has an insurable interest in the consigned property to the extent of his advances. Though I have not yet found a judicial decision on the precise point, yet in the case of *Parks v. General Interest Assurance Company*, 5 Pickering, 34, the immediate right to demand of the insurer the amount of advances on the property destroyed, without a previous pursuit of the claim on the consignors for the advances, was not questioned by the insurers.

Where the hundred is responsible for the loss by fire, it would seem that the insured is entitled on the policy to the full amount, though he might recover full indemnity from the hundred.

But, independent of the foregoing considerations, I think that, on the facts agreed, the insured was entitled to recover the full insurance; those facts ascertaining that he was interested in the loss to that extent. There is no ground on which his claim is resisted but that furnished by the ascription to the court of law, of power to look at the executory contract of sale in the manner a court of equity might, and to consider the interest in the property to have passed by the sale, if a court of equity would, at the instance of the insured, decree its specific performance. Without giving a judicial approbation to this proposition, but for this case conceding its correctness unquestionable, the inquiry is, on what terms would this contract be enforced at the instance of the vendor? To the solution of this question, it is material to ascertain the effect of the parol agreement, stated in the agreed case to have been made before and after the execution of the written contract of sale, for the transfer by the vendor to the vendee of the policy of insurance. No one can reasonably suppose that the contract to transfer the policy was separate from, and independent of, the contract of sale. In the nature of things, it is not to be surmised that such a separate and independent contract could precede that for the sale of the property. We must understand that it constituted a part of the parol treaty for the sale, and formed one of the considerations of that parol agreement which must precede the reduction of it to writing; was omitted by accident or design in reducing it to writing; and was subsequently recognized. By it, the vendor was to assure to the vendee the benefit of the insurance, and was bound to obtain the assent of the insurers to the assignment. This, in a court of equity, could have been set up by the vendee in resistance of the specific performance which would deny him the benefit of the insurance; and a court of equity would not have compelled performance, without an abatement for the loss. The assured was therefore interested at the time of the loss, to the full amount; and in every view of the case, I think the judgment ought to be affirmed.

TUCKER, P. Without impugning the doctrines of insurance as laid down in the cases cited for the plaintiffs in error, I am of opinion that the judgment in this case was right.

In the formation of this opinion, I have been mainly influenced by the agreed fact, that both before and after the contract between Peay and Morrison there was a parol agreement that Morrison should transfer to Peay the policy of insurance. It is objected, however, that that agreement cannot be admitted, either as a distinct, independent contract, or for the purpose of affecting the written contract. And this question is reserved. It must, I think, be decided against the plaintiffs in error.

By whom was the evidence of this parol contract introduced, and on whose behalf was it designed to operate? Was it introduced by the plaintiffs in error? If so, how is it competent for them now to deny the validity and effect of their own evidence? It is impossible; and it is accordingly intimated at the bar that it was introduced by and on the part of Morrison. Now Morrison was the party to be bound by it, and if he chooses to recognize it as a binding and valid agreement, notwithstanding it was by parol and not introduced into the body of the agreement, who can gainsay it? A parol contract is not void by the statute of frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is introduced for his benefit by the statute, and may of course be renounced by him. If he is willing to abide by it; if, disdaining the *mala fides* of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract, and confesses its obligation, shall it not be enforced? Let the unvarying course of equity cases answer the question. How then can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him, is not to be so considered? The pretension I conceive to be utterly without foundation.

I take the agreement, then, to assign the policy as a substantive and most material part of this case; and I will now proceed to show how (taking that fact into consideration) Morrison, at the time of the fire, was damnified by the destruction of the premises.

It cannot be denied that according to the spirit of the agreement to assign the policy, Morrison was bound to give to Peay the benefit of it when the house was burnt. By that occurrence, however, the policy became *functus officio*. An assignment after that would have been futile. But as, by the agreement, Peay was to have the benefit of the indemnity, so it is clear that he would have been entitled to demand from Morrison any benefit which he might derive from the insurance. Nay more, if Morrison had instituted his bill against Peay to enforce a specific execution of the contract of sale, a court of equity must have departed from its ordinary principle of holding the purchaser bound by the loss, and have refused a specific execution except upon the terms of making good that loss. It could not have compelled Peay to sustain a loss which, by the very contract itself, it was clear he did not engage to abide, but against which, in effect, he contracted to be insured. If, therefore, Morrison could have enforced the policy, the court would have obliged him to give the benefit of his recovery to Peay, or to relinquish the contract; or if, as is now contended, the policy was rendered nugatory by the sale, the court, in the exercise of its sound discretion, would not have deemed a specific execution reasonable, since Peay was not in equity bound to bear the loss against which he had in effect contracted to be insured. Morrison must then have lost his contract, or indemnified against the damage.

What then was the state of the case immediately upon the happening of the fire? Morrison then had the legal title in him. But it is said that, having sold, the title was to be considered in Peay, upon equitable principles. This position has been advanced upon false deductions from the principle that equity considers that done which ought to have been done. But equity never so considers, but in behalf of one who has done equity, and has put himself in a condition to demand the execution of his contract. Now, at the time of the fire, it did not appear whether the contract ever would be carried into complete effect. It did not appear whether Peay ever would or could comply, and therefore equity could not consider the title to be in him. He had not delivered the bond which was to have been delivered. That bond was to be the bond of a.

third person, and it might never have been in his power to deliver it. It was not delivered within the stipulated time. He then, on the 5th of May, 1836, was in default (for the bond had not even then been delivered), and on that day he had no right to demand a specific execution of the contract, and of course could not be deemed to have the title. The title was then in Morrison; the house burned was his house, and the loss sustained was his loss. This is the more manifest when we reverse the picture. Morrison sues for a specific execution. Peay repels the demand unless he will pay for the house: alleging that by his contract he was to be protected against loss by fire; that Morrison either can or cannot give him the benefit of the policy of insurance for which he contracted; that if he can, but will not, he has no title to relief; that if he cannot, then he cannot give what was most essential in the contract, and a court of equity will not relieve him. In the exercise of that discretion which is always exercised in bills for specific performance, it will not compel a party to execute the contract, when he cannot get that which he contracted for. It would be unreasonable to compel him to take the property without the indemnity, when he expressly contracted for the indemnity: and equity will not do that which is unreasonable.

This defence would be unanswerable, and Morrison must either have kept the land, or paid for the loss. If he kept the land, he would be clearly entitled to recover of the insurers. If he paid the loss, he would be a loser, and entitled to indemnity from them to the identical amount.

It has been contended, however, that as the contract was carried into execution subsequently, it appears that Morrison sustained no damage. I am by no means satisfied that the fullest proof of his having received the entire consideration, without deduction for the loss, could take from him a right of action which had previously attached. But if proof of indemnity by that means could be a bar, then it must be clearly established, and the onus is on the defendants. The damage having been proved by the plaintiff, the indemnification must be shown by the defendants. But it is not shown; since, for aught that appears to the contrary, Morrison is liable on the action of Peay for not transferring the policy, or has indem-

Breach of Contract to insure. — Damages.

nified him for the loss, which, upon every equitable principle, he was bound to do.

Upon the whole, I think the judgment is right. The insurers have received their premium for a succession of years, and now seek to avoid the fulfilment of their contract upon the pretext that the insured has received indemnity from another quarter. Without calling in question the cases on insurance, we should not be too astute, I think, in the application of a principle by which a burden is to be taken from the shoulders of those who have been paid to bear it, and cast upon one of two innocent persons, who have advanced their money to be absolved from it.

PER CURIAM. *Judgment affirmed.*

ELA v. FRENCH.¹

(Supreme Court, New Hampshire, December Term, 1840.)

Breach of Contract to insure. — Damages.

The defendant agreed to insure certain books consigned to him by the plaintiff, but failed to do so, and a large portion of them were destroyed by fire while in the defendant's possession. In an action for the breach of contract to insure, *held*, that the measure of damages, in the absence of proof of usage, was the value of the books.

THIS was an action of assumpsit. The defendant, a publisher of books, agreed with the plaintiff to receive and sell such books as should be consigned to him by the plaintiff, and to procure insurance upon the same. Thereupon the plaintiff shipped a large quantity of books to the defendant to be sold on commission. The latter neglected to get the books insured, and all but the contents of two boxes were burned.

The question raised was in respect to the amount of recovery.

Bartlett & Fletcher, for the plaintiff.

Perley & Hutchins, for the defendant.

GILCHRIST, J. There is no evidence in the case on which to charge the defendant upon the first count, for books sold and delivered, nor upon the second count, for money had and received.

¹ 11 N. H. 356.

Breach of Contract to insure. — Damages.

The only question in the case arises upon the other counts which allege a delivery of the books to the defendant, for sale on commission; a contract by him to cause them to be insured, and their subsequent destruction by fire, without any insurance having been effected upon them. The plaintiff has proved the contract, as alleged in the declaration, and the breach of it by the defendant, in neglecting to effect an insurance upon the books, and their destruction by fire; and the only question seems to be whether the plaintiff shall recover the value of the books, as damages for the breach of the contract.

The defendant has offered no evidence to show the course of business, or the custom and usage of merchants in contracts of this kind, if any custom exist.

Nor has he shown whether, by the usage of merchants in New York, a contract to insure generally goods consigned for sale on commission, is understood to impose on the party the duty of causing the goods to be insured at their full value, or for less amount. We have then before us evidence of a contract to insure, and of a breach of that contract; and without anything to explain it, what rule of damages can we adopt? The loss to the plaintiff was the value of the books; and we must presume, in the absence of evidence, that if they had been insured, it would have been for their value. This value, then, is the only measure of damages. Probably the insurance offices in the city New York have some rule for their guidance in granting policies upon property of this character, and perhaps they will not insure beyond a certain proportion of the value of such property. But even if this be so, we have no evidence to guide us in ascertaining the rate per cent. upon the value of the books. When we lay aside the value of the books as our guide, we have no more authority to take one sum than another, as the extent of the damages, for there is no custom of which we can judicially take notice.

We must, therefore, consider this as a contract to insure the books at their full value. If the defendant had desired to limit his liability to any particular sum, by proof of any custom explanatory of contracts of this description, it was competent for him to offer such evidence. As this has not been done, there must be

Judgment on the verdict.

Avoiding Policy. — Keeping Gunpowder.

FAULKNER v. CENTRAL FIRE INSURANCE COMPANY OF NEW
BRUNSWICK.¹

(Supreme Court, New Brunswick, Hilary Term, 1841.)

Avoiding Policy. — Keeping Gunpowder.

Where by the conditions subjoined, and referred to, in a policy of insurance upon goods against fire, it is declared "that if there should at any time be more than twenty-five pounds weight of gunpowder on the premises insured, or where any goods are insured, such insurance should be void, and no benefit derived therefrom," the deposit of gunpowder over the weight, though for a temporary purpose, will vacate the policy.

To a plea alleging such a breach of the conditions of the policy, a replication averring that the powder had been put on the premises without the plaintiff's privity, because a vessel in which it was intended to ship it to Windsor had sailed without it; and the plaintiff had used every exertion to find another conveyance without success; in consequence of which it remained on the premises until a fire broke out which eventually consumed the plaintiff's premises; but that long before it reached those premises the gunpowder was removed, and thrown into the harbor, and no loss or damage occasioned thereby to the goods insured, — was held bad on demurrer.

THIS was an action of debt on a policy of insurance on goods against fire. The first count of the declaration stated that by a certain deed poll or policy of assurance made by the Central Fire Insurance Company of New Brunswick, and sealed with their common seal, on the 30th May, 1839, reciting that the plaintiff had paid to the said company the sum of £8 16s. for the assurance from loss or damage by fire, for a term commencing on the 30th day of May, 1839, at twelve o'clock at noon, and ending on the 30th day of August, 1839, at twelve o'clock at noon, of the following premises, viz: goods, hazardous and not hazardous, contained in store number two, and a room in number one, occupied by assured as an office, on Donaldson's Wharf, in the city of St. John, part of the said goods being owned by the assured, and part held by him on commission, £550, from the 30th day of May to the 30th day of August, 1839. It was by the said deed or policy of assurance witnessed, "that the capital or joint stock estate and securities of the said Central Fire Insurance Company of New Brunswick should be subject and liable to pay, make good, and satisfy unto the said assured all such loss and damage as should happen by fire to the said property therein above mentioned,

¹ 1 Kerr, 279.

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within ninety days after proof thereof, provided the same should amount to the sum of five pounds, which the said insured should suffer by fire in the premises above mentioned, during the term aforesaid, not exceeding however the sum of five hundred and fifty pounds, the amount insured by the said policy." And by certain provisions in the said deed poll or policy of assurance contained, it was provided and declared to be the true intent and meaning of the said policy that the capital or joint stock estate and securities of the said company should not be liable or subject to pay or make good to the insured any loss or damage which should happen by any invasion, foreign enemy, civil commotion, mob, riot, or any military or usurped power whatever, or by any earthquake, or hurricane, nor for loss occasioned by the explosion of gunpowder. Other provisos were then set out, and the declaration proceeded as follows, viz : And it was also by the said deed poll or policy of assurance further declared and agreed " to be the true intent and meaning of the parties thereto, that in case the therein abovementioned premises shou'd at any time after the making and during the continuance of that said insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous in the conditions annexed to the said policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same conditions denominated hazardous or extra hazardous, unless in the said policy otherwise specially provided for, or thereafter agreed to by the said company in writing, to be added to or indorsed upon the said policy, then and from thenceforth, so long as the same should be so appropriated, applied, or used, the said policy should cease and be of no force or effect." And it was thereby moreover declared that the said policy, or the insurance thereby intended to be made, did not comprehend or cover " any books of account, written securities, deeds, or other evidence of title to lands, bonds, bills, or other evidences of debt, money, or bullion." And it was also by the said deed poll or policy of assurance further declared to be understood and agreed, as well by the corporation of the said Central Fire Insurance Company as by the insured named in the said policy, and all others who might become interested

therein, "that the said insurance was made and accepted in reference to the conditions which accompanied the said policy; and in every case the said conditions were to be used to explain the rights and obligations of the parties, except so far as the said policy itself specially declared those rights and obligations." The conditions of insurance referred to in the body of the said deed or policy of insurance were then set out at length; among others the following: "It is declared and conditioned that goods not hazardous were such as are usually kept in dry goods stores, including also household furniture and linens, cottons in bales, coffee, flour, indigo, potash, rice, sugar, and other articles not combustible. Second, that goods, wares, and merchandise therein denominated hazardous, were china, glass, and earthenware in packages, booksellers' stock, chip and straw hats, flax, hemp, groceries, including spirituous liquors, oil, pitch, saltpetre, tar, turpentine. Third, that the goods, wares, and merchandise therein, denominated extra hazardous, were aqua fortis, ether, spirits of turpentine, hay, straw, fodder, grain unthrashed, and cotton wool not in bales." It was also by the said condition declared, that if there should be at any time more than twenty-five pounds weight of gunpowder in the premises insured, or wherever any goods were insured, or if the said gunpowder should not be inclosed and kept in tin canisters, or if it should be sold by artificial light, in any or either of the said cases such insurance should be void, and no benefit derived therefrom, and in no other way or manner should gunpowder be insurable, and that no unslacked lime should be kept on the premises wherever any goods were insured, unless it was properly secured from rain or water. It was then averred that the said Central Fire Insurance Company became insurers to the said plaintiff for the said sum of £550, in the same deed poll or policy of assurance for the time and on the terms and conditions therein mentioned; and that at the time of making the said policy of assurance, and also at the time of the loss therein-after mentioned, he, the said plaintiff, had divers large quantities of goods, wares, and merchandise, of the denomination mentioned in, and insured by the said policy, stored and housed in the said store and room in the said policy mentioned to a large amount in value in the whole, to wit: to the amount of

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all the money by the said company so insured or caused to be insured thereon by the said policy. It was then averred, that the plaintiff was interested in the goods insured, and that afterwards and whilst the said goods were so remaining in the said store and room mentioned in the said policy, in the city of St. John aforesaid, and whilst the same store and room was in the occupation of the said plaintiff, and whilst the said plaintiff continued to be so interested in the said goods, and before the expiration of the said term for which the same were so insured as aforesaid, to wit: on the seventeenth day of August, in the year aforesaid, the said store and room mentioned in the said policy of assurance, together with divers other buildings near or adjoining thereto, were accidentally consumed by fire, without any fraud, collusion, or contrivance of him, the said plaintiff, whatsoever, and that large quantities of the said goods, so insured by the said policy, were wholly consumed and lost to the said plaintiff by the said fire to a large amount in the whole, to wit: to the amount of £429 19s. 2d. of the amount insured by the said policy. It was then averred that notice was given to the company of the loss, and that a particular account was made out and rendered, verified by the oath of the plaintiff; and that the plaintiff also made oath that no other insurance was effected; that he procured a certificate from a notary public contiguous to the place, and no way concerned in the loss, as to the character of the plaintiff, and the absence of fraud or evil practice, &c., as required by the conditions of the policy; and that the premises mentioned in the said policy of assurance were not, at the time the said fire, happened, nor at any time after the making of the said policy, appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated hazardous or extra hazardous in the said conditions annexed to the said policy, or for the purpose of storing therein any articles, goods, or merchandise in the same conditions denominated extra hazardous, or for storing therein any articles not specially provided for in the said policy. It was then averred that the stipulated time for paying the loss after due proof thereof had elapsed, and that the plaintiff had been ready and willing, and had offered to submit all matters in difference to arbitration,

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&c.; that the defendants had refused payment, whereby *actio accrevit*, &c. There were two other counts on the same policy, which it is not material to set out; also the common counts.

The defendants pleaded, among other pleas, the following to the three special counts, viz: And for a further plea in this behalf as to the said supposed causes of action in the said first, second, and third counts of the said declaration mentioned, the said defendants by like leave, &c., *actio non*, &c., because they say that there was, after the execution by the said defendants of the said deeds poll or policies of assurance as aforesaid, in the said store and room in the said deeds poll or policies of assurance in the said first, second, and third counts of the said declaration, to wit, at the city of St. John, in the city and county of St. John aforesaid, at the time and while the said goods, wares, and merchandise of the said plaintiff were so remaining in the said store and room as aforesaid, and before the said expiration of the said term for which the said goods were so insured as aforesaid, by the last mentioned deeds poll or policies of assurance, and at the same time the fire mentioned, &c., so accidentally broke out in the city of St. John as aforesaid, to wit, on the 17th day of August, in the year aforesaid, a large quantity of gunpowder, to wit, five hundred pounds weight of gunpowder, contrary to the terms and conditions of the said deeds poll or policies of assurance in the said last mentioned counts of the said declaration described, to wit, at, &c., by reason whereof the said last mentioned deeds poll or policies of assurance were and are void, and of no force, to wit, at the city aforesaid, in the city and county aforesaid, and this they, the said defendants, are ready to verify: wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against them, &c. The fifth plea was similar to the fourth, only stating that there was a quantity of gunpowder on the premises, viz., twenty-five pounds weight, not kept inclosed and in tin canisters, contrary to the conditions of the said policy. To these pleas was the following replication: And the said plaintiff, as to the said pleas of the said defendants by them fourthly and fifthly above pleaded to the said first, second, and third counts of the said declaration, saith [*precludi non*, &c.], "because he saith that

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although true it is that there was, after the execution by the said defendants of the said deeds poll or policies of assurance as aforesaid, in the said store in the said deeds poll or policies of assurance mentioned, to wit, at," &c., "at the time and while the said goods, wares, and merchandise of the said plaintiff in the said first, second, and third counts of the said declaration mentioned, were so remaining in the said store and room, and before the expiration of the said time for which the said goods were so insured as aforesaid by the said deeds poll or policies of assurance, and at the time the fire mentioned in the said first, second, and third counts of the said declaration, so accidentally broke out in the said city of St. John as aforesaid, to wit, on the 17th day of August, in the year aforesaid, a quantity, to wit, eight kegs of gunpowder, of the weight of twenty-five pounds and upwards, to wit, of the weight of two hundred pounds, not inclosed in tin nor any part thereof, which was the same gunpowder as is mentioned in the said fourth and fifth pleas of the said defendants above pleaded to the said first, second, and third counts of the said declaration; yet for replication thereto the said plaintiff saith, that the said eight kegs of gunpowder, being the same gunpowder as is mentioned in the said fourth and fifth pleas of the said defendants, was not put into the said store or room in the said deeds poll or policies of assurance mentioned, but was kept and deposited at the powder-house or magazine at Carleton, in the neighborhood, in the said city of St. John, until a short time before the said fire in the said first, second, and third counts of the said declaration mentioned; and that afterwards, to wit, on the 15th day of August, in the year aforesaid, to wit, at" &c., "the same eight kegs of gunpowder were brought over across the harbor of St. John, in the city and county aforesaid, from the said powder-house in Carleton aforesaid, to be shipped on board a vessel bound to Windsor, in the province of Nova Scotia, then lying in the said harbor of the said city of St. John, but that before the said gunpowder could be shipped on board of the said vessel, so lying in the harbor aforesaid, and bound for Windsor, in the province of Nova Scotia as aforesaid, the said vessel departed and sailed away from the said harbor of St. John aforesaid, whereby the said eight kegs of

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gunpowder or any part thereof could not be put on board the said vessel, and there being no other vessel ready to sail from the city aforesaid, or other conveyance by which said gunpowder could be sent or conveyed to Windsor, in the said province of Nova Scotia as aforesaid, the same eight kegs of gunpowder were afterwards, to wit, on the said 15th day of August, in the year aforesaid, without the knowledge or privity of the said plaintiff, placed in the said store in the said deeds poll or policies of assurance mentioned, by the person who had the same in charge, there to remain only until a conveyance could be found to transport the same to Windsor, in the province of Nova Scotia aforesaid, it being then expected that such conveyance would be found in the next day or two; but no conveyance being found to take the said gunpowder away, the same necessarily and unexpectedly (although every exertion was used by the said plaintiff and his servants to obtain a conveyance by which the said gunpowder could be sent away from the said store, remained in the said store, to wit, at," &c., "until the said time of the said fire in the said first, second, and third counts of the said declaration mentioned, to wit, until the 17th day of August, in the year aforesaid, and that after the said fire in the said first, second, and third counts of the said declaration mentioned, had so broken out in the city of St. John aforesaid, but long before the said fire had reached or been communicated to the said store or room in the said deeds poll or policies of assurance mentioned, or any of the buildings next adjoining thereto, or any of the buildings upon the wharf upon which the said store and room were situated in the city aforesaid, all and every part of the said eight kegs of gunpowder, which had been so placed in the said store as aforesaid, being the same gunpowder as is mentioned in the said fourth and fifth pleas of the said defendants, was removed from the said store and room and thrown into the water and mud in the slip there of the said harbor of St. John aforesaid, and entirely excluded from any danger of explosion from the said fire, and without any alarm or apprehension thereof of the persons there present; and the same gunpowder was not, nor was any part thereof, burnt or exploded by the said fire, to wit, at," &c. "And the said plaintiff further saith, that except the said eight kegs of gunpowder so placed

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in the said store in manner aforesaid, and for the time aforesaid, and so as aforesaid removed from the said store in the said deeds poll or policies of assurance mentioned, there was not, after the execution by the said defendants of the said deeds poll or policies of assurance as aforesaid, any other gunpowder in the said store or room mentioned in the said deeds poll or policies of assurance in which the said goods of the said plaintiff so insured as aforesaid were placed, at any time before, or at the time of the said fire in the said first, second, and third counts of the said declaration mentioned; and that the said deeds poll or policies of assurance did not, thereby, become void and of no force, in manner as in the said pleas of the said defendants fourthly and fifthly above pleaded is alleged; and this the said plaintiff is ready to verify: wherefore," &c. To this replication there was a special demurrer, assigning for causes, 1st. That the plaintiff professes in the first instance to admit the allegations contained in the defendants' said pleas, and then alleges matter which amounts to denial of the same, and concludes with a verification. 2dly. That the said replication is double. 3dly. That the said replication alleges matter in excuse which is in direct violation of the terms and conditions of the deed poll or policy of insurance set out in the three first counts of the plaintiff's declaration, and as in contradiction of some of the plaintiff's material averments in those counts. 4thly. That the said replication is evasive, uncertain, and argumentative, and also for that the said replication is in other respects uncertain, informal, and insufficient, &c. Joinder in demurrer.

Street, Q. C., in support of the demurrer. The special counts set out the policy, and the conditions of it, and aver that none of the conditions have been broken; and, in fact, this is a necessary averment in declaring on a policy of assurance; the fourth plea in answer to the special counts alleges that a large quantity of powder, to wit, five hundred pounds, was on the premises in question; and in the fifth plea it is alleged that more than twenty-five pounds was in the place, contrary to the terms of the policy, by which it became void, and of none effect.

The replication admits that eight kegs, or two hundred pounds, of powder were brought from Carleton and put into

the premises in question, thus showing a direct breach of the condition relative to powder, but it assigns causes for doing this which afford no legal excuse for such breach, and consequently the policy by the express provisions of it has become void. The Court stopped *Street*, and called on

The Solicitor General, in support of the replication. This policy is made for goods hazardous and not hazardous, and it contained this express stipulation, "that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance be appropriated, applied, or used," &c., for the purpose of storing therein any of the articles, goods, or merchandise, in the same conditions denominated hazardous or extra hazardous, unless herein otherwise specially provided, or hereafter agreed to by the company in writing, to be added or indorsed upon the policy, then and from thenceforth so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect." Wherefore by this wording it is clear that so soon as the premises cease to be so appropriated, applied, or used for storing articles hazardous or extra hazardous, the policy is in full force. Now granting, as admitted by the replication, that so long as the powder was in the store the policy was of no effect, yet as it appeared that the powder was removed long before the fire approached the store, such removal revived the liability, and placed the parties in the same condition as if the powder had never been placed there. By the conditions of the policy the goods are denominated not hazardous, hazardous, and extra hazardous; powder is not excluded from insurance, but is only required to be insured in a particular way; the having of more than twenty-five pounds of powder in the store at any one time does not make void the policy *in toto*, but only for such time as the powder may be in the store endangering the premises, and on removal the liability continues. [PARKER, J. I cannot see how the fact of the plaintiff intending to send it to Windsor could affect the question.] That is connected with the fact of removal, which would revive the policy. The meaning of the policy is, where the store is distinctly appropriated for the purpose of storing such article, not when it comes there by accident or for a temporary purpose, doing no damage, and

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removed beforehand; in the disappointment of shipping the goods, they could not be left in the street. [PARKER, J. Why could the plaintiff not send the powder back to the magazine at Carleton?] It is conceived the court will look at the reasonable construction of the policy, and give effect to it accordingly; otherwise, if more than twenty-five pounds of powder should happen to be in the store at any one time of the policy, for only five minutes, months before the fire, and no way connected with it, the policy must be deemed void. Now this could never have been the intention of the parties; one part of the policy must be construed with reference to the other. [PARKER, J. You may go further, and argue that hazardous and extra hazardous goods may be stored in the premises to any extent, provided they are removed the instant before the fire approaches them; but it is evident that though the fire might be in the next store, people would fear to approach the building containing the powder; the article gunpowder is in the policy ranked differently from other articles, for there is an express condition relating to it, viz.: "If there shall be at any time more than twenty-five pounds of gunpowder in the premises insured, or wherein any goods are insured, such insurance shall be void."] Goods are denominated not hazardous, hazardous, and extra hazardous; this condition concerning powder applies to an extra hazardous article; and as this policy is confined to goods not hazardous and hazardous, the condition concerning powder does not affect it. [CARTER, J. You contend that a hundred pounds of gunpowder is one of the extra hazardous articles.] Yes; if insurance had been gotten for extra hazardous articles, the condition would have applied to it; but it is not so: the true reading of the policy is, if the article is left on the premises, then and then only can the policy be affected. [CHIPMAN, C. J. It is conditioned that if the powder is sold by artificial light or not kept in tin canisters, the policy will be void. You may as well contend that these conditions are not to be regarded in expounding the policy. PARKER, J. What words could the makers of the policy have used stronger to prohibit the keeping of more than twenty-five pounds of powder at any time in the store? CHIPMAN, C. J. These conditions are used to explain the policy, and are a substantial part of it; the condition con-

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cerning powder is express to render the contract void.] The case of *Dobson v. Sotheby*¹ supports the argument relied on; for it is there said that in a policy of insurance on premises of a certain description, "where no fire is kept, and where no hazardous goods are deposited," these words must be understood, of the habitual use of fire and deposit of hazardous goods; where, therefore, the loss on such policy happened in consequence of making a fire and bringing a tar barrel in the premises for the purpose of repairing them, it was held that the insured was entitled to recover. In this case the rate of premium paid by the plaintiff was the lowest rate, and was only payable for buildings of a certain description, wherein no fire is kept and no hazardous goods are deposited; there were other articles fixing a higher rate of premium for buildings of other descriptions, with the same proviso against hazardous goods; and a proviso that if buildings of any description insured with the company shall at any time after such insurance be made use of to stow or merchandise any hazardous goods, without leave from the company, the policy shall be forfeited; and Pollock, for the defendant in this cause, contended that the plaintiff could not recover, because lighting a fire within the building (which was done) was a contravention of the terms of the policy, which required that no fire should be kept in the building on which the rate of insurance in the present case was paid; and that a tar barrel, which was found, and caught fire, on the premises, came under the description of hazardous goods; but Lord Tenterden said: "If the company intended to stipulate not merely that no fire should habitually be kept on the premises, but that none should ever be introduced upon them, they might have expressed themselves to that effect; and the same remark applies to hazardous goods also. In the absence of any such stipulation, I think the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction, as in this case, for a temporary purpose connected with the occupation of the premises; the common repairs of a building necessarily require the introduction of fire upon the premises," &c. [PER CURIAM. That case makes against you; for here there is an express stipulation, according to the

¹ Mood. & M. 90.

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suggestion of Lord Tenterden; nor was it necessary here to bring the powder into the store, as in that case to make the fire for the purpose of repairing the premises.]

CHIPMAN, C. J. I have not the slightest doubt on the question in this case. We have only to look at the terms of the policy, and preserve the rights of the parties agreeably to their own stipulations. In the conditions of the policy the different classes of goods are described; then follows a particular clause relating to gunpowder, viz.: "that if there shall be at any time more than twenty-five pounds weight of gunpowder on the premises insured, or wherein any goods are insured, or if the said gunpowder shall not be inclosed and kept in tin canisters, or if it shall be sold by artificial light, in any or either of the said cases such insurance shall be void." This is a positive and unqualified condition, inserted by the parties to prevent the introduction of gunpowder. In the case cited there was no express clause against making a fire on the premises, but in the case at the bar there is an express condition against the introduction of gunpowder; and it seems by the parties to have been considered a necessary clause, and we cannot but give effect to the words of a contract, which seem clearly to manifest the intent of the parties, which they have used. I think, therefore, according to the meaning of the parties, to be collected from the express words of the contract, that on the introduction of this gunpowder the policy became void.

CARTER, J. I am quite of the same opinion. The parties must be bound by their positive stipulations. The argument pressed by the learned counsel for the plaintiff that powder of any quantity is to be classed among the extra hazardous goods, is inconsistent with the terms of the policy; for it expressly provides that if at any time more than twenty-five pounds of gunpowder be on the premises, the contract shall be void. This seems to have been the express intent of the parties, and I think any other construction would be perfectly at variance with the words and meaning of the policy. If there shall be at any time, says the contract, more than twenty-five pounds of powder, then the policy shall be void; the replication acknowledges there was a time when more than twenty-five pounds was on the premises; wherefore I think the policy became void.

Notice of Loss. — "Contiguous" Magistrate. — Waiver.

PARKER, J. I am of the same opinion. There has been an express breach of one of the conditions, the consequence of which is to make void the policy; the excuses assigned in the replication cannot do away with the effect of the condition; the gunpowder is even admitted to have remained on the premises with the knowledge of the plaintiff. If policies are made and accepted with conditions like these, what protection would there be for insurance offices if they could be violated with impunity under the circumstances set forth? How can this court decide that the plaintiff is entitled to recover upon the facts as they stand admitted in this record?

Judgment for the defendants.

TURLEY vs. THE NORTH AMERICAN FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1841.)

Notice of Loss. — "Contiguous" Magistrate. — Waiver.

The clause in a policy requiring a certificate of the loss from a "magistrate most contiguous to the place of the fire" does not require an exact literal compliance.

The certificate of one whose place of business was two or three blocks from the fire was held sufficient, although another magistrate lived within a block and a half from the place.

The omission in such certificate to state that the magistrate was "acquainted with the character of the insured" may be cured by the refusal of the insurer's agent to return the certificate for correction or point out wherein it was defective.

THIS was an action on a policy of insurance tried at the Albany circuit in April, 1840, before the Hon. John P. Cushman, one of the circuit judges.

The plaintiff, being a cabinet maker, was insured by the defendants against loss or damage by fire to the amount of \$500, upon stock finished and unfinished, tools and lumber, contained in a building, and in a shed near the same, on the east side of North Market Street, in the city of Albany, for the period of six months and twenty-four days from 10th October, 1837. On, the 30th October, 1837, the buildings with their contents were consumed by fire. By the ninth condition referred to in the

¹ 25 Wendell, 374.

policy, persons sustaining loss or damage by fire are required forthwith to give notice thereof in writing to the company, and as soon after as possible to deliver as particular an account of their loss and damage as the nature of the case will admit, signed with their own hands, accompanying the same with their oath or affirmation, declaring the account to be true and just. They are also required to produce "a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss: stating that he has examined the circumstances attending the fire, loss or damage alleged; that he is acquainted with the character and circumstances of the insured claimant; and that he verily believes that he, she, or they have, by misfortune and without fraud or evil practice, sustained loss and damage on the subject insured, to the amount which the magistrate or notary public shall certify; and until such proofs, declarations, and certificates are produced, the loss shall not be payable." On the 31st October the assured gave notice of the loss, and on the 7th day of November served upon the agent of the company at Albany an inventory of the property destroyed, amounting to upwards of \$900, and an affidavit made by him stating the value of the property (at the time of the insurance, stated to have been \$1,600, and at the time of the loss \$1,200), setting forth the circumstances of the fire, and alleging the inventory to be just and true. The inventory was not signed by the assured. His affidavit was accompanied by affidavits of other persons tending to verify the affidavit of the assured as to the property on hand at the time of the loss, and bearing testimony to his good character. Then followed the certificate of the Hon. Jacob Lansing, a judge of the Albany county courts, in which, after certifying that he had examined into the circumstances attending the loss, he proceeds as follows: "And that I have been made acquainted by the foregoing affidavits and otherwise with the character and circumstances of the within named James H. Turley, the insured, also within mentioned; and that I verily believe from the foregoing affidavits that he has, by misfortune, and without fraud or evil practice, sustained loss and damage on the property insured to the amount of the inventory hereto annexed." On the 20th day of November,

the agent of the company served upon the assured a notice that the company excepted to the sufficiency of the preliminary proofs, specifying sundry particulars in which they were deemed exceptionable, and amongst others that the inventory was not signed by the assured; that the certificate of Judge Lansing was not sufficient; and that the company required the certificate of a magistrate or notary public most contiguous to the place of the fire. The assured thereupon repeatedly called upon the agent to return to him the preliminary proofs that they might be amended; but the agent refused to return them. On the 6th day of December the assured served a further affidavit of a third person, verifying the affidavit and inventory of the assured. On the trial of the cause, after the execution of the policy was proved, it was shown on the part of the defendants that Judge Lansing, who granted the certificate, was not the magistrate most contiguous to the place of the fire; that he resided three or four blocks north, and his office or place of business was two or three blocks south of the place of the fire, though it was conceded that he daily passed the place in going from his dwelling to his office; that an alderman of the city lived directly across the street from the place of the fire, and a notary public resided within a block and a half of the place. On this evidence the defendants objected to the sufficiency of the preliminary proofs; which objection was overruled by the circuit judge. The plaintiff then adduced proof of his loss, and the jury found a verdict in his favor for \$425. The defendants, on a bill of exceptions, moved for a new trial.

J. Holmes, for the defendants, insisted that the preliminary proofs were totally insufficient; that the magistrate who had granted the certificate was not the magistrate most contiguous to the place of the fire; and if his certificate could be received, it did not comply with the terms of the condition annexed to the policy.

R. W. Peckham, for the plaintiff.

By the Court, *NELSON, C. J.* The only question important to notice in this case is, whether the certificate of the magistrate furnished to the defendants was a sufficient compliance with the ninth condition of the policy. It is urged, 1st, that the magistrate was not the most contiguous to the place of the fire; and 2d, that the certificate is bad in point of form.

This clause of the contract of insurance is to receive a reasonable interpretation; its intent and substance, as derived from the language used, should be regarded. There is no more reason for claiming a strict literal compliance with its terms than in ordinary contracts. Full legal effect should always be given to it, for the purpose of guarding the company against fraud or imposition. Beyond this, we would be sacrificing substance to form — following words rather than ideas.

The magistrate, it appears, resided some three or four blocks north of the place of the fire, and kept his office, or place of business, two or three blocks south, usually passing it several times daily. A case can scarcely be imagined where the locality of the officer would afford a better opportunity to acquire a knowledge of the facts to which the certificate relates. An alderman of the city resided across the street, and nearer to the fire than Judge Lansing; but whether nearer than his office is not stated. The latter place may be regarded in ascertaining the magistrate most contiguous within the meaning of the condition. His business relations arising out of his official and professional pursuits, transacted there, will be presumed to afford the requisite information as far as locality is concerned. For all the purposes of the condition, it is the place most favorable to the company.

It seems the residence of a notary happens to be a few feet nearer the fire than the office of the judge, and we are asked to go into a nice calculation of distances, and settle the point upon the laws of mensuration. *De minimis, &c.*, is a sufficient answer to this objection. The spirit of the condition requires no such mathematical precision from the assured. Its object is completely secured by the proximity of the certifying magistrate.

As to the form of the certificate. It is said that the magistrate does not certify that he is acquainted with the character and circumstances of the assured, &c. The certificate is not as particular in this respect as is required by the terms of the condition, and yet it is as full as may be practicable in many cases. The magistrate "most contiguous" may not always be personally acquainted with the character of the claimant, and must rely upon inquiry, and proof produced as in this case, for the requisite knowledge. I prefer, however, placing the answer

Preliminary Proofs. — Waiver.

to the objection here, mainly, upon the refusal of the agent to show preliminary proofs to the party when asking to see them with a view to their correction. It appears that he was repeatedly called upon for that purpose, and as often refused sight of them. It is true he had before transmitted written objections to these proofs, but they were quite indefinite in respect to the certificate, and did not advise as to the particulars in which it fell short. No copy had been kept by the assured, and it was important, therefore, to examine the original with a view to a correction. Indeed, the agent when thus directly called upon, in fair dealing, should not only have produced the papers, but pointed out the particulars in respect to which he considered them deficient. So liberal is the practice of the offices in England, says Mr. Ellis (*Ellis on Ins.* 62), that upon application after the fire, they usually furnish the assured with the necessary information for proving the loss. It certainly becomes all, at least, to throw no embarrassments in the way; and surely there should be no contrivance to mislead the claimant when he is honestly endeavoring to comply with the conditions.

New trial denied.

See the following case.

McMASTERS & BRUCE vs. THE WESTCHESTER COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, January, 1841.)

Preliminary Proofs. — Waiver.

If there be a formal defect in the preliminary proofs, which could have been corrected had an objection been made by the underwriters to payment on that ground, the production of further preliminary proofs will be considered as waived if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their objection upon other grounds.²

In this case, which was an action upon a fire insurance policy, the point upon which the case turned was in respect to the right of the defendants, under the circumstances, to object to the preliminary proofs of loss furnished by the plaintiffs.

¹ 25 Wend. 379.

10 Peters, 507; 2 E. D. Smith, 268; 1

² See also 9 Johns. 192; 16 Wend. 401; Bosw. 338; 20 N. Y. 293.

About two weeks after the loss, the plaintiffs furnished notice of the same to the defendants, and about four weeks after the loss an affidavit of the same and a certificate were furnished. The latter was defective in not having a seal attached. A letter in the following words was produced by the plaintiffs from the defendants, written some five months after the delivery of the certificate : —

“ To yours of the 10th inst., received yesterday, I reply that your letter of the 29th July last, stating that you had sustained damage by fire was laid before the committee for advisement, and that committee reported that in its opinion your claim was invalid, and ought not to be paid. You are, therefore, left to pursue such course in the premises as you may be advised.”

T. H. Lee, for the plaintiffs.

M. T. Reynolds, for the defendants.

By the Court, NELSON, C. J. Whether the learned judge was correct or not, in charging that the plaintiff, McMasters, was entitled to recover for the whole loss in the names of the plaintiffs, if he had purchased the share of his copartner before the fire, is a question not material to decide ; because he submitted the distinct fact to the jury, upon which the point of law rested, and they have found that no such purchase was made. This finding renders the opinion expressed wholly unimportant in the case.

The course the judge took on the trial in submitting certain questions to the jury, with a view to avoid the necessity of a second trial, was objected to, but such course is not uncommon at the circuits where a doubt is entertained upon the law ; it cannot operate to the prejudice of either party, and frequently avoids the trouble and expense of a new trial. It is in the nature of a special verdict, which the jury may always find. 2 R. S. 421.

I think the judge was right, also, in submitting to the jury, whether the company were not concluded from taking exceptions to the preliminary proofs. Although repeated communications had taken place with the officers and agents of the company, and in some instances, in pursuance of directions from the board, after the preliminary proofs were delivered, no such ground was taken. On the contrary, the fair inference

Pleadings. — Preliminary Proofs. — Assignment.

from all proof in the case is, that other grounds were put forth and mainly relied upon to defeat the recovery. The law is well settled, that if there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to payment on that ground, if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived. 16 Wendell, 401; 10 Peters, 507. There are few cases that come before us presenting stronger claims to the application of this rule than the present one, or that better exemplify its propriety and justice. The agents were neighbors of the assured, in daily communication with him on the subject of his claim; some of them obviously seeking for the means of defeating it by inquiries into the situation and title of the property destroyed, and by interrogation of the parties, and yet no distinct objection taken as to the preliminary steps, that might now be regarded as fatal. Had the objection been made in the course of these interviews, the defects might at once have been remedied, as is obvious from the authorities already referred to.

New trial denied.

See *Burritt v. Saratoga County Mut. Ins. Co.* 5 Hill, 188, *post*.

FERRISS & EATON vs. THE NORTH AMERICAN FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, January, 1841.)

Pleadings. — Preliminary Proofs. — Assignment.

A policy contained the condition that all fraud or false swearing should cause a forfeiture of the insurance. *Held*, That the condition had reference to fraud in the preliminary proofs only.

E., one of the insured in this case, made an assignment to F., the other insured party, of his interest in the property covered by the policy, the company's consent being given. A loss having subsequently occurred, this action was brought in their joint names, one count of the declaration alleging the assignment. *Held*, that the count was bad as it showed that the plaintiffs could not properly sue jointly. *Held*, also, that a plea in bar alleging the same facts in answer to another count was good.

¹ 1 Hill, 71.

THE case is sufficiently stated in the opinion.

S. Stevens, for the plaintiffs.

W. C. Noyes, for the defendants.

By the Court, COWEN, J. This company was originally incorporated by the name of the Phoenix Fire Insurance Company of the city of New York (Sess. Laws of 1823, p. 11). The tenth section (Id. p. 115) declares, that policies executed as this is, without the corporate seal, shall have the like force and effect, to all intents and purposes, as if the seal of the corporation had been or was affixed thereto, and that an action of covenant, or on the case, may be maintained thereon against the corporation. The name was subsequently changed to the North American Insurance Company, by Sess. Laws of 1836 (ch. 99, p. 140). These statutes furnish an answer to the demurrer which objects to the form of the second count. It is said that count should have been in covenant, expressly and in terms, or it could not be joined with the first count, which is clearly covenant; that it is equivocal, and may be considered as a count in case, or covenant; that the policy not being treated therein as a deed, the plaintiffs must be taken to have elected under the statute to bring case; and therefore here is a misjoinder of counts. Independently of the introductory words of the declaration, I should think the objection good. The plaintiffs' second count, in itself, being equivocal in this respect, the defendants might elect to consider it in case, under the rule that doubtful words must be taken most strongly against the party pleading. I am inclined to think, however, this doubt may be taken to be removed by the introductory words, "In a plea of a breach of covenant," which, as always understood, when in that place, apply to the whole declaration. But without deciding that point, the demurrer is not taken in such a form as to raise the question. A demurrer for a misjoinder of counts must be to the whole declaration. 1 Chit. Pl. 180, 394, Am. ed. of 1825, marg. pages. Here the demurrer applies to the second count only, which, taken independently, is valid, whether it be in case or covenant. The substantial objection to this count will be considered in the sequel.

Another question of form is raised by the demurrer to the fifth plea to the first count, viz., the plea of fraud. One condition

of the policy is that all fraud or false swearing shall cause a forfeiture of claims on the insurer; and shall be a full bar to all remedies against the insurer on the policy. Looking at the nature of a policy, and the context of this and others containing the like clause, there can be no doubt that it means fraud, &c., in the preliminary proofs only. It would be idle as applied to the original concoction of the policy, which is always avoided by the common law, for the least want of good faith in the assured. The plea, therefore, should have averred that the alleged fraud was committed in the rendition of the preliminary proof; but above all, that it was committed by the plaintiffs or some party in interest. Both are said to be implied by the plea; and by a somewhat liberal course of intendment, I admit that may be made out. But by the rule, that a title or defence must always be expressly stated in pleading, in order to sustain it against a demurrer, a very serious doubt arises upon its import. No one is named as a party to the fraud, nor is it averred to lie in the preliminary proof. The case is open to the implication that the fraud might have been committed by some one over whom the party in interest had no control. That is highly improbable, I admit; but we are not called to the office of presumption after verdict. The question arises on demurrer, specially assigning for cause, that the plea does not fasten the fraud upon the party. Under the rule before adverted to and applied to the second count, the plea, being equivocal, must be taken most strongly against the defendants.

But the vital question in this particular action is raised by the demurrer to the third plea to the first count, and is involved in the demurrer to the second count of the declaration; viz., that the plaintiff Eaton having assigned to the plaintiff Ferriss, before the loss happened, all interest in the subject of the policy and in the policy itself, and that with the consent of the defendants, the former should not have been joined as a party plaintiff; but the action should have been brought by Ferriss alone.

It is supposed that the plea fails to raise this question, inasmuch as it is a plea in bar, whereas it should have been in abatement for a misjoinder. The plea is, that one of the plaintiffs has assigned his legal interest to the other. It is, in effect,

the same as a plea that all the plaintiffs had assigned their interest. The plea, if valid, destroys the right of the plaintiff Eaton, and the right of both when they come jointly. The case is probably about the same as a plea that one of several plaintiffs has assigned under the statute of bankruptcy, or setting up his attainder where the cause of action is forfeited. It is very questionable whether such matter be not merely in bar; though it is said of outlawry, forfeiture, or attainder, pleaded against a sole plaintiff, that either may be pleaded in bar, or abatement, at the defendant's election. 1 Chit. Pl. 386, Am. ed. of 1828. But the misjoinder of plaintiffs is always a matter which operates as a bar in assumpsit, even on the general issue. Therefore, if pleaded, it would amount to the general issue, which is a plea in bar. Vide *Facquire v. Kynaston*, 2 Ld. Raym, 1249. In covenant it is equally a matter in bar, and, I think, properly pleaded as such. It is not necessary to deny that it might also be pleaded in abatement; a form to which some books certainly give countenance.

Upon the main question, the 14th section of the act incorporating this company seems to be decisive. It declares that in case any person or persons assured shall assign the subject matter, he may also assign the policy; and, notice being given to the company before the loss happens, the assignee shall have all the benefit of the policy, and may sue in his own name. That is this case. Eaton's interest, both equitable and legal, departed on executing the assignment, as much so as that of an insolvent debtor on executing his assignment and obtaining his discharge. All right vested in Ferriss. This is fatal to the action; and there must be judgment for the defendants on the demurrer to the second count of the declaration, and to the third plea to the first count; and for the plaintiffs on the demurrer to the fifth plea to the first count.

Judgment accordingly.

MACARTY vs. COMMERCIAL INSURANCE COMPANY.¹

(Supreme Court, Louisiana, January Term, 1841.)

Insurable Interest. — Alienation of Property.

A conveyance by the insured of the premises covered by the policy terminates his insurable interest, although it is agreed between himself and the grantee that he shall still receive the rents and profits of the estate.

APPEAL from the court of the first judicial district.

This is an action on a policy of insurance to recover the sum of \$2,300, the value at which a house and appurtenant buildings were insured at in Champs Elysées Street, in New Orleans, and destroyed by fire.

The plaintiff alleges, that on the 19th May, 1836, he caused insurance to be made at the office of the defendants, on the foregoing property, to the amount or value stated, and that during the continuance of the policy of insurance, to wit, on the 8th April, 1837, the buildings insured were destroyed by fire, and that the insurers thereby became liable for the entire amount of the insurance. He prays judgment therefor.

The defendants denied that the plaintiff was the owner of the property insured, or that he had any insurable interest therein, at the time it was destroyed, and prayed that the suit be dismissed.

Upon these pleadings and issues the cause was tried.

The evidence showed that on the 26th of September, 1836, after taking out the policy of insurance on the buildings in question, the plaintiff made a donation *inter vivos*, by authentic act, of this property to Mademoiselle Eugenie Adelaide Gomez, without assigning, or in any manner conveying the policy of insurance. The act of donation gives the houses and lot which were insured, together with other property, to the said donee *in full* property, without any restriction or qualification whatever, except that she cannot alienate it, and can only dispose of it by last will and testament. Evidence of the deposition of the donee was offered by the plaintiff, and rejected, to show that it was agreed between her and the plaintiff, that he was to

¹ 17 Louisiana (Curry), 365.

Insurable Interest. — Alienation of Property.

receive and enjoy the rents and profits of the premises, and that he did receive them, pay the taxes, make all repairs, &c., thereby indicating that he had a qualified interest or right of property in the same, which amounted to an insurable interest.

The case turned on the question, Had the plaintiff an insurable interest in the property at the time of its destruction by fire? The district judge decided this question in the negative, and from judgment for the defendants the plaintiff appealed.

Grymes, for the plaintiff.

Preston, contra.

MORPHY, J., delivered the opinion of the court.

The plaintiff seeks to recover \$2,300 on a policy of insurance, in the usual form against loss and damage by fire. On the 19th of May, 1836, he caused insurance to be effected on a house and kitchen for the space of one year; within that time the buildings were totally destroyed by fire, but before this loss occurred the insured had made a donation *inter vivos* of the property to one Eugenie Adelaide Gomez, and had transferred to her all his title and interest in and to the same in the most unqualified terms; the only restriction imposed on the donee's absolute right of ownership was that she could not alienate or dispose of the property, except by last will and testament. The question is, whether, at the time of the loss, there remained in the donor such an interest in the property insured as should entitle him to recover.

It is said that this donation is void for want of the appraisement required by article 1525 of the Louisiana Code, and we have been referred to the case of *Williams et al. v. Horton's Curator*, 4 Martin, N. S. 464. Admitting that a party can be permitted to impugn his own deed in order to recover rights which he might have lost by executing the same, the ground assumed is untenable. The decision alluded to relates to a donation of slaves made under the Old Civil Code, which required in express terms that slaves and movables comprised in a donation *inter vivos* should be estimated. Civil Code, p. 128, art. 48. The Louisiana Code provides for this appraisement only with respect to movable effects.

It is next contended, that as this donation is liable to be revoked or dissolved on account of ingratitude on the part of

the donee or the birth of children to the donor, there was a contingent right or interest in the property subsisting in plaintiff at the time of the loss. If this be true, it is difficult to imagine a case in which a vendor of insured property destroyed by fire could not with as much reason set up a similar claim; he might always be said to have a contingent interest in the property sold, because a sale is liable to be cancelled for lesion, fraud, error, nonpayment of the price, &c. And so may every contract be annulled for some cause known to the law, if such cause of nullity should be shown to exist. A vendor's interest would not be more remote or unsubstantial than that now supposed to have existed in plaintiff. Louisiana Code, arts. 1546, 1547, 1548, 1556. The bare possibility that a right to property might hereafter arise cannot be considered as an insurable interest; there must surely be something at risk in which the insured is actually interested, and for which in case of loss he can claim indemnity. The general rule is, that in order to have an insurable interest in any subject, a person must be liable to a direct and immediate loss by its damage or destruction. 1 Phillips on Ins. p. 68 (ed. of 1840). The loss of the property in this case fell on the donee who had become the absolute owner of it by a title translatif of property, and had the policy been assigned to her with the consent of the underwriters, she was clearly entitled to recover. It would not have been objected to her that her title was defeasible by the happening of those contingencies upon which plaintiff attempts to show an interest in himself. Had any of the causes occurred which in law would give rise to plaintiff's right of revocation, or to a legal reversion of the property to him, his interest in the same might perhaps be said to have revived; but when none of the causes existed at the time of the loss, when it is not even made probable that they ever will exist, how can the plaintiff be supposed to have suffered a loss for which he must be indemnified. Having parted with all his interest in the property before its destruction, plaintiff cannot recover.

In order to establish an actual and subsisting interest in himself at the time of the loss, the plaintiff has offered testimony to prove that previous to and at the time of this donation there was an understanding and agreement between the donee and

himself, that notwithstanding the donation he was to continue to receive and enjoy the rents of the house during his lifetime, and that, pursuant to such agreement, he did receive the rents and pay all repairs, taxes, &c., up to the time of the fire. The introduction of this testimony was resisted as inadmissible under the article 2256 of the Louisiana Code. It appears to us that it should not have been received; it goes to show between the parties a donation *causa mortis* instead of one *inter vivos*, as evidenced by the deed. But even were this agreement legally proved, we do not think it could avail the plaintiff under the evidence in the record before us.

A policy of insurance against fire is a personal contract of indemnity with the insured; if the latter parts with all his interest in the property before the loss happens, the policy becomes void unless it has been assigned to the new proprietor with the consent of the underwriters. If the assured retains but a partial interest in the property, it will only protect such insurable interest as he had at the time of the loss: such is the doctrine of the leading cases on this subject. 3 Brown's P. C. 497; 2 Atkins, 554; 16 Wendell, 397; 1 Hall, 44. What, then, is the loss sustained by the plaintiff? It cannot be the full value of the house insured, for before the loss he had divested himself of all proprietary right in it, legal or equitable. This right to receive the rents, which it is said the donee had agreed to let plaintiff enjoy, was an interest of a character and value quite different from that which he had at the time of the insurance. Had it been described to the underwriters, and made the subject matter of the insurance, a value might have been put upon it, which of necessity would have been considered as liquidated damages recoverable by the insured, but insurance here was effected for \$2,300, as the full value of the house; since then it has ceased to belong to the plaintiff. Admitting the latter's interest under this agreement in relation to the rents, the record contains no evidence which can enable us to measure the damages or loss resulting to him from the destruction of the property. It has been pressed upon us that the least vestige of interest subsisting at the time of the loss authorizes a full recovery. To this proposition we cannot accede. It is repugnant to the principle of indemnity which pervades

Insurable Interest. — Husband and Wife. — Furniture.

the whole law of insurance against fire; nor do we think it sustained by the adjudged cases to which we have been referred, that any insurable interest, legal or equitable, remaining in the insured at the time of the fire, will be protected by the policy. There cannot be a doubt but a recovery can be had only for the value of that interest, or to the extent of the actual loss proved on the trial; the sum mentioned in the policy is to be regarded as the extent of the insurer's liability, and not as the measure of the assured's claim. The undertaking is to pay the amount of the actual loss or damage sustained by the insured, provided it does not exceed the sum mentioned in the policy to which the indemnity is limited. 1 Hall, 46; Hammond on Insurance, 2, 19.

It is therefore ordered that the judgment of the district court be affirmed, with costs.

CLARKE *et ux.* vs. FIREMEN'S INSURANCE COMPANY.¹

(Supreme Court, Louisiana, January Term, 1841.)

Insurable Interest. — Husband and Wife. — Furniture.

In Louisiana a husband has an insurable interest in his wife's personal property. An insurance on household furniture contained in a dwelling-house covers furniture stored in the garret, not in constant use.

APPEAL from the commercial court of New Orleans.

This is an action on a policy of insurance. The plaintiff and wife allege that insurance was effected on a large quantity of furniture, in a house in the city of Lafayette, built, the lower story of brick and the second of wood; said furniture belonging to them amounting to \$1,000.

The defendants averred that by the policy insurance only was effected on the property of J. Calvit Clarke, the husband, and that the furniture alleged to be destroyed was the property of the wife, and not covered by the policy; that it was only intended to insure such furniture as was in use in the house,

¹ 18 Louisiana (Curry), 431.

such as beds, tables, &c., which would easily be removed in case of fire; but that most of the furniture for which indemnity is claimed was stored in a garret, and is not embraced by the description in the policy of insurance.

Upon these pleadings and issues the cause was principally tried.

It was shown by the evidence that Mrs. Clarke had been the keeper of a boarding-house in Julia Street, but had removed to a small house in Lafayette; and that a portion of the furniture not immediately or constantly used was stored in the garret. The policy was taken out in her husband's name and the house and furniture fully described. The fire and loss of property were proved within the time of the policy.

The district judge was of opinion \$750 would replace the loss and damage, and gave judgment for that sum, from which the defendants appealed.

Roselius & Clarke, in propria persona, for the plaintiffs and appellees.

Lockett & Micou for the defendants.

SIMON, J. delivered the opinion of the court.

Plaintiffs sue for the recovery of the sum of \$1,000, which is the amount of a policy of insurance. They allege that in consequence of the loss and destruction by fire of a certain quantity of household furniture contained in their dwelling-house, which furniture was covered by the said policy to the aforesaid amount of \$1,000, they are entitled to claim indemnity from the underwriters, to the full amount of the policy. Defendants plead that the insurance declared on was effected only on the property of J. C. Clarke, and that the loss occurred was on the separate property of his wife, which was not insured. That the loss occurred on property not embraced in the description of the policy; that an officer was sent to the house containing the property offered for insurance, for the purpose of examining into the situation and value of the said property, and that none of the property, for the loss of which indemnity is claimed, was shown to the officer. They further aver that the property in question was not required for the ordinary purposes of plaintiffs' family, and was not used by them as household furniture; that the same was stored in a

garret of the house ; that if the same had been shown to their inspector for insurance, a larger premium would have been required ; and that when the fire took place, if the furniture had been shown to be in that part of the house, or if notice had been given to the firemen, there was ample time for the removal of the same, and the same would have been removed and saved.

The lower court gave judgment in favor of the plaintiffs for seven hundred and fifty dollars ; from which judgment the defendants appealed.

The offer or application for insurance signed by J. C. Clarke says, that " insurance is wanted for one year on household furniture, looking-glasses, beds, &c., to the amount of one thousand dollars, contained in a house in Lafayette city, on Bellegarde Street, built, the first story of bricks, the second *and garret* of wood, and covered with slate." There is an accidental variance between the offer and the policy with regard to the description of the house ; several witnesses have been heard to establish all the circumstances relative to the fire, the extent and value of the loss and damage, and the situation of the furniture in the different rooms of the house, and particularly in the garret, where a certain quantity of it was stored. The evidence shows also that this furniture was occasionally used as it was wanted ; that the house was small and the family very large, in consequence of which said furniture was taken upstairs, and only brought down when it was to be used ; and it is also established that the property which was lost, destroyed, or damaged, belonged to Mrs. Clarke, who formerly kept a boarding-house.

The main ground of defence set up by the underwriters is, that the furniture did not belong to Clarke, but was the property of his wife, and that therefore he had not himself any insurable interest in the policy. It is perfectly clear that the husband has the power of administering the estate of his wife, and particularly her movable property, and to act in his own individual name with regard to the said administration.

If the wife's property be dotal, the husband alone has the administration of it, although the wife remains the proprietor thereof (La. Code, art. 2330) ; and if, on the contrary, her estate

is paraphernal, it is considered to be under the management of the husband, unless it be administered by the wife alone and separately (Id. art. 2362), which is not shown to be the case in the present instance. Clarke had therefore such interest and right in the furniture, as necessarily authorized him to insure it, even in his own name, without its being necessary for him to declare the nature and extent of his interest.

The next ground is, that no information as to the exact situation of the property had been given by the plaintiffs, and that the risk was increased by the furniture being stored in a garret, from which it was difficult to remove it. This objection is, in our opinion, untenable. The policy of insurance was made in reference to the furniture, &c., generally contained in the house in which the plaintiffs resided, without any distinction or exception as to the particular rooms in which said furniture should be kept. The description of the house given in the written application shows that the underwriters were informed that there was a garret; and although this was not included in that part of the policy in which the house is described, we think it was the duty of the defendants or of their inspector to look into all the matters or circumstances necessary to ascertain the nature of the risk. The garret was a part of the house, to be used by the inmates, as well as any other apartment; there they were in the habit of storing the furniture which they did not want for their daily use; and we are unable to see any reason why such furniture should be excepted from the general effect of the policy. If the underwriters were ignorant of this fact, they must attribute it to their own fault or negligence.

On the whole, we think the judge *a quo* did not err in giving judgment in favor of the plaintiffs, and in allowing them seven hundred and fifty dollars for the loss and damage by them sustained.

It is therefore ordered, adjudged, and decreed, that the judgment of the commercial court be affirmed, with costs.

 Loss of Machinery. — Rule of Damages.

VANCE vs. FORSTER, WHITTAKER, AND JOHNSON, three of the Directors of the York and London Assurance Company.¹

(Nisi Prius, Ireland, March, 1841.)

Loss of Machinery. — Rule of Damages.

In an action for the loss of a cotton-mill and machinery, the insured is entitled only to indemnity for his actual loss; one mode of determining which is to ascertain the cost of setting up new machinery in the mill, and deduct the difference between the value of the old machinery as it was when destroyed and the new as it is when erected; but there is no fixed rule as to the proportion to be deducted.

ASSUMPSIT on a policy of assurance against fire. The declaration contained one count, setting out the policy *verbatim*, and the usual money counts: the defendants pleaded the general issue.

The premises in question consisted of a cotton-mill and the machinery thereof. The assurance was against damage by fire, not exceeding in amount the sum of £3,500, which sum was by the policy apportioned in respect of the several parts of the property intended to be insured in the manner following, viz.: £800 on the building, £400 on a part of the machinery called "millwrights' work," and £2,300 on the residue of the machinery, which, in the policy, was called "clockmakers' work;" and by the policy the contracting parties on behalf of the assurance company contracted and agreed with the plaintiff in manner following, viz.: "That we the said directors will, in case, during the continuance of this policy, the property hereinbefore described, or any part thereof, shall be burned, destroyed, or damaged by fire, pay or reinstate, or make good to the said assured, his heirs, executors, administrators, or assigns, out of the funds or property of the said company, all such loss or damage as the said assured shall suffer or sustain by such fire, not exceeding in the whole the sum of £3,500, and not exceeding in any case the sum specifically stated against each property hereinbefore described." It appeared that the building and premises, so assured as aforesaid, had been totally consumed by fire, and the only questions between the parties

¹ 2 Crawford & Dix, 118.

were the amount of the loss sustained upon the machinery and the mode in which such loss was to be estimated.

After the trial had been in part proceeded with, it was (in accordance with the suggestion of the court) consented by the parties that the case should be referred to three of the persons who had been empanelled as jurors.

Holmes, with whom were *Joy* and *Vance*, for the plaintiff, submitted that, inasmuch as the plaintiff was entitled to full compensation for the loss which he had sustained, the referees were bound to award to him in the shape of damages, and to extent of the assurance, a sum equal in amount to the price or value of *new* machinery of like description with that consumed: contending that there being sufficient evidence that the machinery was in a perfect state at the time of the fire, it must be taken to have been as valuable to the plaintiff as new machinery would have been; and that as the company had, by the terms of the policy, the option of "*reinstating*" the premises, they were bound, in default of so doing, to give to the plaintiff a sum sufficient to reinstate the same premises, which could only be done by the substitution of new machinery; there being no such commodity in the market as second-hand or old machinery of the requisite description.

Gilmore, with whom were *Tomb*, *Whiteside*, and *Edward Wright*, *contra*. The plaintiff here insists upon getting, as compensation for the loss of old machinery, the full value of new machinery, but this we submit he is not entitled to. Loss by fire is always estimated in the same way, whether the thing destroyed be machinery or furniture, a carriage or a ship. It is said that the machinery in the plaintiff's mill was in perfect repair; but a ship must also be kept in repair, and yet it cannot be maintained that an old ship is of the same value as a new one. The present question is of great importance to insurance companies, and there is no reported case in England or Ireland in which it has been raised; there is, however, a case decided in Scotland, *The Hercules Assurance Company v. Hunter*, 14 Dunlop & Bell, Jur. Ca. 147, which is an express authority for holding that, in cases of this description, allowance is to be made for the age, wear, and tear of machinery. We are also prepared with evidence to show that the uniform practice in

England, in cases like the present, is to deduct a sum certain for wear and tear. [PENNEFATHER, B. I apprehend that such evidence ought not to be received.] Supposing a partnership existing in a cotton-mill, and a new partner to be taken in, it would be held contrary to the rules of equity to charge, as against him, the price of new machinery for engines which had been a long time in use.

Holmes, in reply. I admit that, in the abstract, old and new machinery are not of the same value; but there is no such thing to be procured for purchase as old machinery, and the plaintiff must be indemnified. The case of *The Hercules Assurance Company v. Hunter* does not apply to the present one, for there the question was fraud, or *bona fides*, and the observations of the judge in that case were extrajudicial. The question to be decided in this case, on the evidence, is simply this: What was the amount of the whole of the loss sustained by the plaintiff? Beaumont on Insur. 59. [PENNEFATHER, B. That only establishes that there is no settled principle as to the mode of estimating the relative values of old and new machinery.]

PENNEFATHER, B., addressed the referees in manner following, viz.: The loss upon the buildings is not disputed; therefore, to the extent of the sum insured upon them, there is no question; these two items remain, viz., the sum of £400 insured on "millwright's work," and the sum of £2,300 on what is called "clockmakers' work." On these two items the question which you are about to determine arises. It has been properly stated that a policy of assurance is a contract of indemnity; and although the assured may name such sum, on which to pay a premium, as the assurance company shall agree to, yet the nomination of and assent to such sum will not conclude the company as to the amount of the sum payable in case of loss. In such case, the assured will not, under any circumstances, recover more than the sum named in the policy; and he will not recover so much unless he proves that he sustained damage to the amount of that sum; and in every case, where the amount of the damage falls short of the sum named in the policy, the amount of the sum payable by the assurance company will be commensurate with the damage. You are

Loss of Machinery. — Rule of Damages.

now to inquire into and ascertain the actual damage which the plaintiff has sustained in relation to those portions of the assured premises which are covered by the sum of £400 and £2,300: to arrive at a proper conclusion thereupon, you are to take into account the state of the plaintiff's mill as it was at the time of the fire, which you will ascertain from the evidence produced before you; and you will then take into your consideration the first cost of the machinery which has been consumed, and the state or condition of the machinery of the mill immediately before the fire took place. It is said on the one side, that (in estimating the plaintiff's loss) it would not be unfair to take the value of new machinery as a standard; on the other side it is contended that a certain ratable deduction ought to be made from the price of new machinery, and that the balance is the sum at which the plaintiff's loss ought to be estimated. These may be propositions not undeserving of your consideration, but are not, in my mind, the tests by which you are to arrive at a conclusion upon the matters now before you. It is impossible to lay down any fixed rule, or to say that a third or fourth is to be deducted as a difference of value between old and new machinery, because that would be to exclude from your consideration the actual state and serviceable order of the machinery at the time of the fire. You are to see in what state and condition the machinery was at the time of the fire, and what it would cost to replace that machinery: you may try what it would cost to replace it with new machinery, taking into account the entire expense of new machinery; and if you resort to that mode, you are then to inquire whether the mill would be better, and how much better, with new machinery than it was with the machinery standing therein at the time of the fire, and the difference in value should be deducted from the expense of the new machinery. The plaintiff (to the amount of the sums insured) must be borne harmless as to his loss; and I think that the expense of the carriage of the machinery from the place where it is to be purchased to the mill, and of setting it up so as to put the insured premises in *statu quo*, ought to form a part of the plaintiff's compensation. By the terms of the policy, the company had the option of putting the premises in their former state, and it was proper

in them to reserve that option for the purpose of protecting themselves against fraud and excessive demands; but if they do not choose to exercise that option, but say, "We will repay you the amount of the loss," then that amount is to be ascertained by estimating the cost of restoring the premises to the state they were in at the time of the fire by which they were destroyed. It may be difficult to ascertain the cost of restoring the mill exactly to its former state; but I think it might fairly be done by estimating the amount of the sum which it would cost to set up new machinery in the plaintiff's mill, and then deducting from that sum the difference in value between such new machinery when erected and the old machinery when destroyed. In this manner I think that the actual loss sustained by the plaintiff could be ascertained; but there is no particular standard or rule by which the difference in value between old and new machinery is to be estimated. You are to estimate the loss actually sustained by the plaintiff, and although I have suggested one way in which, as I think, this loss may be estimated, yet other modes or ways of estimating it may occur to your minds; at the same time, it is to be borne in mind that, in point of law, the plaintiff is entitled to be indemnified for his actual loss only.

The arbitrators retired, and having heard evidence on both sides, made the award in favor of the plaintiff for £3,320 5s. 11d. damages, and sixpence costs.

See *Brinley v. National Ins. Co.* 11 Met. 195, *post*; *Hoffman v. Western Ins. Co.* 1 La. An. 216, *post*.

JONES vs. MAINE MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Maine, April, 1841.)

Prior Insurance. — Double Insurance. — Reinsurance.

Where a person has his store insured by a company, one of the rules in the policy being, "that no person whose property is insured in the company shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect;" and where he afterwards insures the goods in the store at another office, the policy on the store is not made void by obtaining the policy on the goods.

¹ 18 Maine, 155.

THE parties agreed to submit to the opinion of the court, upon a statement of facts, the question, "Whether the insurance obtained on the 27th day of March on the goods then in said store destroyed the policy effected by the defendants? If it did, the plaintiff is to be nonsuit, otherwise the defendants are to be defaulted."

From the facts agreed, it appears that on February 9, 1839, the defendants insured against perils by fire the sum of two hundred dollars on the store of the plaintiff in Lewiston, and that on March 27, 1839, the plaintiff obtained insurance at an office in Boston on his stock in trade in the same store, against perils by fire to the amount of \$1,200. Afterwards, during the year 1839, the store was wholly consumed by fire. In the second article of the by-laws of the company, § 2, when speaking of the rates of premium on different classes of risks, are found the following words: "First class. Houses unconnected with and standing at least four rods from any other building." "Second class. Like buildings when connected with or standing within four rods of any other building." The eighth section is: "That no person whose property is insured in the company shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office, and in case of any such insurance his policy obtained from this company shall be void and of no effect."

The case was submitted on the briefs of the counsel.

Codman & Fox, for the plaintiff, cited *Cornell v. LeRoy*, 9 Wend. 163; *Tyler v. Aetna Ins. Co.* 12 Wend. 507; 1 *Moody & M.* 90.

Fessenden & Deblois, for the defendants.

The opinion of the court was by

SHEPLEY, J. To connect, is to join one thing to or unite it with another. And a literal exposition of the language of the eighth section of the by-laws would not prohibit the plaintiff from insuring his stock in trade at another office. That would be a very forced construction, which should regard goods deposited in a warehouse for a few days, to be again removed, as connected with it. And goods in a shop for sale are placed there for safe keeping and exhibition until sold, and they have no necessary union with that more than with any other shop.

And they cannot, by any proper use of the word, be considered as connected with it. There is nothing in this case indicating that the parties used the word in any unusual sense. On the contrary, it appears to have been used in the second section of the by-laws in its ordinary acceptation. In the first class of risks by houses unconnected with other buildings, are intended those not united with or joined to them. And in the second class, by buildings connected with others, are designated those so joined or united. A just exposition of the language, and the apparent intention of the parties in the use of it, authorize the conclusion, that the plaintiff has not incurred any forfeiture by obtaining insurance upon his goods elsewhere.

Defendants defaulted.

See *Illinois Mutual Fire Ins. Co. v. O'Neill*, 13 Ill. 89 (1851); *Neve v. Columbian Ins. Co.* 2 McMull. 220, *post*.

THE FRANKLIN FIRE INSURANCE COMPANY vs. FINDLAY.¹

(Supreme Court, Pennsylvania, May 1st, 1841.)

Alienation. — Seizure on Execution. — Effect of.

A mere seizure of goods by a sheriff under an execution against the insured, and fastening the window shutters and doors, but without any removal of the goods from the building, does not constitute an alienation of the property.

ERROR to the district court for the city and county of Philadelphia. The questions involved sufficiently appear in the opinion.

Mr. *T. I. Wharton*, for the plaintiff in error. . . . The exceptions to the charge raise a question which is believed not to have been decided, viz., the effect upon the contract of insurance of a levy by a sheriff, accompanied with an actual change of the possession and custody of the goods. We contend that there was such a change of the property in the goods as to avoid the contract. Insurance is a personal contract entered

¹ 6 Wharton, 483.

into on the faith of the insured continuing the owner, and having an interest to preserve the goods; and does not follow the goods into other hands. *Lynch v. Dalzell*, 4 Br. P. C. 431; *Sadlers' Co. v. Badcock*, 2 Atk. 554; *Carroll v. Boston Ins. Co.* 8 Mass. Rep. 515. Here the authorities show that by the levy and other proceedings the property was changed. *Watson on Sheriff*, 175, and the cases there cited; *Rorke v. Dayrell*, 4 Term Rep. 402; *Payne v. Drew*, 4 East, 522; *Fontaine v. Phenix Ins. Co.* 11 Johns. 293. It will be said that the sheriff has only a special or qualified property in the goods; but the answer is, that such a change of property alters the contract, as it makes the property, if any remains in the insured, different from what it was. The provision for "assigns" in the policy does not extend to the sheriff. *Platt on Covenants*, 525. At all events, there was a change of possession which increased the risk. It is like a deviation in marine insurances, which is said to comprehend, "every act of the assured or his agents, which, without necessity or just cause, increases or changes the risks included in the policy." 1 *Phillips on Ins.* 179, 181. The difference between the possession of goods by the owner and a stranger is very material. The evidence shows that here was an actual increase of the risk by the conduct of the sheriff, who nailed up the windows, and went out of town with the key. If he had removed the goods, there would certainly have been an end of the contract. How does it alter the case that they were impounded on the premises? *Roget v. Thurston*, 2 Johns. Cases, 248. Besides, if any one is entitled to recover for the loss of these goods it is the sheriff, for the benefit of the execution creditors. The title of *Findlay* was at least suspended until he paid the execution creditors.

Mr. Meredith and *Mr. Williams*, for the defendant in error. There is but one question then in the case, viz.: Whether there was such a change of property here as avoided the insurance? There is nothing in the policy to show that *Findlay* was to remain in possession. The goods were to be in a country store. It does not follow that the store was to be occupied or kept open all the time. Suppose that *Findlay* had had three or four stores, as sometimes happens; his personal care and superintendence of all could not have been expected. The provision as to

trustees is inapplicable from its terms. In this case, the jury have found that there was no increase of risk. The ordinary proceeding on a levy here is to impound the goods on the premises, and to put a man in charge. Certainly there is no increased risk in merely shutting up the store; and fastening it had the effect of keeping out incendiaries without preventing the ingress of persons disposed to extinguish an accidental fire. The property was not divested out of the defendant in the execution by the seizure. *Watson on Sheriff*, 190; *Wilbraham v. Shaw*, 2 *Williams's Saund.* 47; *Yelverton*, 44; *Dyer*, 99 *a*, 67 *b*; 1 *Brownlow*, 41; *Waller v. Tweedale*, *Moy's Rep.* 107; *Lefans v. Moregreen*, 1 *Keble*, 655; 2 *Eq. Cas. Abr.* 380, pl. 14; *Davis v. Richmond*, 14 *Mass. Rep.* 475; *Thurston v. Mills*, 16 *East*, 254, 274, 278; *Blake v. Shaw*, 7 *Mass. Rep.* 506; *Ludden v. Leavitt*, 9 *Mass. Rep.* 105. The authorities show that there must be an insurable interest; but there is no case which proves that the goods must remain under a particular superintendence. Upon the argument on the other side, what would be the situation of the owner of a house who changes his tenant? In the case of a mortgagor, it has been held that he is entitled to recover. In 3 *Bos. & Pul.* 75; *S. C.* 5 *Bos. & Pul.* 268, is the case of a ship in the possession of captors. *Rider v. Ocean Ins. Co.* 20 *Pick.* 259; *Col. Ins. Co. v. Lawrence*, 2 *Peters*, 25; *Stetson v. Mass. Fire Ins. Co.* 2 *Pick.* 249; *Strong v. Manufacturing Ins. Co.* 10 *Pick.* 40; *Jennings v. Penn. Ins. Co.* 4 *Binn.* 251; *Reed v. Cole*, 3 *Burr.* 1512; *Wells v. Phila. Ins. Co.* 9 *Serg. & R.* 103; *Smith v. Maplenack*, 1 *Term Rep.* 445; *Lock v. N. A. Ins. Co.* 13 *Mass. Rep.* 61; *Brick v. Chesapeake Ins. Co.* 1 *Peters*, 151; *Russell v. Union Ins. Co.* 4 *Dall.* 421; *S. C.* 1 *Wash. C. C. Rep.* 409; *Carruthers v. Sheddon*, 6 *Taunt.* 14; 1 *Eng. Com. Law Rep.* 293; *Ocean Ins. Co. v. Polleys*, 13 *Peters*, 157; 1 *Sumner*, 434. A sale on execution is not a forfeiture. 1 *Phillips on Ins.* 419; *Lane v. Ins. Co.* 3 *Fairfield*, 44; *Graves v. Boston Ins. Co.* 2 *Cranch*, 419; *Lawrence v. Sebor*, 2 *Caines*, 203; *Green v. Reynolds*, 2 *Johns. Rep.* 209; *Lawrence v. Vanhorn*, 1 *Caines*, 276; *Toppan v. Atkinson*, 2 *Mass. Rep.* 365; *Murray v. Col. Ins. Co.* 11 *Johns.* 302; *Oliver v. Green*, 3 *Mass. R.* 133; *Williams v. Smith*, 2 *Caines*, 19; *Fairclaim v. Sham-*

title, 3 Burr. 1300; *Frieslander v. Ins. Co.* 1 Moo. & R. 171; *Hibbart v. Carter*, 1 Term Rep. 745. A subsequent alteration in the nature of the interest does not affect the policy. *Ælma Ins. Co. v. Tyler*, 16 Wend. 397. Here Findlay had a right to redeem, and had, therefore, an insurable interest; and if the case of *Curry v. Commonwealth Ins. Co.* 10 Pick. 542, be law, he was not bound to give notice. *Roberts v. Tradesmen's Ins. Co.* 17 Wend.; Ellis on Insurance 38.

Mr. J. R. Ingersoll, in reply. This is not a question of insurable interest; but of a change of interest and risk produced by extrinsic circumstances. The description of the risk in the policy would not sustain the right to recover if the seizure had actually taken place at the date of the policy. The interest of the assured to preserve and protect the goods is an essential element in the contract. Here the interest of the assured was that the goods should be destroyed. Wager policies are not lawful in Pennsylvania. This was not a country store at the time of the fire, but a sheriff's lock-up house. The underwriters had a right to calculate upon an ebb as well as a flow of the goods. They were not to be fastened up. The execution was not altogether *in invitum*, if judgment was confessed. It was necessary to aver interest in the assured. Hughes on Ins. 20, 21; Hammond on Ins. 113. Generally, where there is access to goods, some are saved. Here there was not salvage to the value of a farthing. A man may insure goods under execution, but he must so describe them. In *Lane v. Ins. Co.* 3 Fairfield, 48, a *levy* is spoken of as defeating an insurance. *Berry v. Smith*, 3 Wash. C. C. Rep. 90; *Doe v. Lanning*, 4 Campbell, 76. The risk was necessarily increased here. The learned judge of the district court left nothing to the jury but the question of extraordinary risk. A proper use of the goods by the sheriff was improper as respects the insurers; and if there is any difference in the kind of risk, the insurers have a right to judge for themselves whether they will continue liable.

The opinion of the court was delivered by

KENNEDY, J. . . . The remaining errors present but one question: and that is, whether the mere seizure of the goods by the sheriff under the execution in his hands against the assured, and closing of the window shutters, and locking of the

doors of the house in which they were found, and were to be kept according to the terms of the policy of insurance, without any change of their situation or removal of them thence being made whatever, is sufficient to discharge the underwriters?

That the policy was good, and covered the goods up to the time of their seizure by the sheriff, is not denied; but it is argued that, as the policy of insurance operates only in favor of the assured personally, and not on the goods, so as to accompany a transfer of the right of property in them, and as the assured must have the same interest or right in them at the time of the loss that he had at the time of obtaining the policy, the seizure of them by the sheriff, which, as it is alleged, divested the assured of the right of property in the goods as well as of the right of possession to them, released the underwriters from all obligation arising out of the policy. That the policy is not assignable, so as to follow or accompany a transfer of the right or interest which the assured had in the goods at the time it was subscribed, may be admitted; but it cannot be admitted that the assured must have, at the time of the loss, the same interest in the goods that he had at the time of procuring the policy, in order to entitle him to claim for a loss actually sustained by a peril insured against. The legal adjudications on this point show the rule to be otherwise, and that he may recover on the policy for the loss of a diminished interest. *Stetson v. Mass. Mutual Ins. Co.* 4 Mass. 330; *Gordon v. Mass. Mutual Ins. Co.* 2 Pick. 249; *Reed v. Cole*, 3 Burr. 1512; *Strong v. Man. Ins. Co.* 10 Pick. 40.

Neither can it be admitted that the seizure of the goods in this case divested the assured of his whole and entire interest and right in the goods. He still retained the general right of property in them, notwithstanding the seizure by the sheriff. The most that the sheriff acquired thereby was the possession, and a special or qualified right of property. *Wilbraham v. Snow*, 2 Saund. 47; *S. C.* 1 Sid. 438; 1 Vent. 52; 1 Lev. 282; 1 Mod. 30; *Clerk v. Wilhers*, 6 Mod. 290. The right of the sheriff by virtue of the seizure is defeasible; and hence I take it that it is his duty to release and give up the goods to the defendant in the execution, upon a tender of the debt and damages, or damages, as the case may be, together with the costs,

being made to him; so that until the goods are actually sold by the sheriff, the defendant has the right to redeem them, in order to prevent a further accumulation of costs and a loss by a sale of them for prices under their real value. The act of assembly of the 22d of February, 1821, regulating the fees to be received by sheriffs in such case, indicates this principle pretty clearly. But the consequence of the goods being destroyed in this case by fire after the seizure, and before a sale could be made of them by the sheriff, without any default on his part, goes to show, to demonstration, as it were, the extent of the interest which the assured still continued to have in their being preserved from such destruction, or otherwise, in being indemnified under the policy for the loss occasioned thereby to him. It will not admit of a question, I apprehend, that the destruction of the goods by the fire must be his loss, unless he can obtain remuneration from the insurers upon the policy. Indeed, there is no other upon whom it could possibly be made to fall, except the sheriff or the plaintiffs in the execution. As to the sheriff, it will scarcely be claimed that he is answerable, unless he failed to use ordinary diligence in taking care of and preserving the goods; for he can only be considered a bailee at most for compensation, and therefore responsible only for ordinary negligence. Story on Bail. 96, pl. 130; page 263, pl. 398. That he was guilty of such negligence, or did not use ordinary diligence, is not pretended. And as to the plaintiffs in the execution, it must be admitted that they are innocent and free from all blame whatever. The only person, therefore, connected with the goods taken in execution and destroyed by the fire, that appears to have been in default, is the assured, the defendant in the execution; and he doubtless is so because he did not long before pay to the plaintiffs the debt for which the goods were taken in execution. Hence the plaintiffs having failed, without any default on their part, or that of the sheriff, to derive any benefit or satisfaction for their debt from the goods of their debtor having been taken in execution, it would appear to be just and reasonable that the assured should still be held liable upon the judgment against him to pay the debt for which his goods were taken in execution. Under this view, his interest in the policy was as great at the time of the loss of the

goods by fire as at any time before. Consequently, he is entitled to recover upon the policy, unless, from the evidence given on the trial, the jury could have found, from the seizure of the goods by the sheriff, and his conduct in regard to them, that the risk had been materially increased. We are satisfied, however, that none of the evidence given tended to prove anything of the sort; and without evidence tending to prove it, the court would have erred, had it referred such a question, as a matter of fact to the jury, to be decided by them. From the evidence it appears, without any contradiction whatever, that the goods remained precisely in the same situation after the seizure that they were in before, when it is admitted that they were covered and protected by the policy. But it is said that the sheriff, after making the seizure, fastened down the windows, closed the window shutters, and locked the doors of the storehouses containing the goods, and having done this, took and kept the keys in his own possession. The fire, it must be observed, happened in the night, long after the usual time of closing stores and ceasing to do business in them, indeed, after all the citizens had gone to bed; so that the storehouses were really in the same situation at the time of the fire, that they doubtless would and ought to have been had no seizure been made. The circumstance of the sheriff's having the keys, and being out of the place at the time of the fire, is immaterial, because it had nothing to do with producing the fire, and could not in the least degree prevent the goods from being destroyed by, or saved from it; for the doors could have been forced open had it been thought that it would have availed anything, in as short a time without the keys, as they could have been opened by the use of them. Findlay, the assured, was present at the fire, and having the same interest in the goods to save them from being destroyed that he ever had, must be presumed to have done all that he would, had the seizure not taken place.

There is not, therefore, any ground, so far as the evidence goes, upon which any increase of risk can well be imagined. The judgment is therefore affirmed. *Judgment affirmed.*

POWER, TUTRIX, ETC. vs. OCEAN INSURANCE COMPANY.¹

(Supreme Court, Louisiana, June Term, 1841.)

Alienation. — Repurchase. — Effect of.

Although a policy provides that in case of any transfer or termination of the interest of the insured the policy shall be void, it is not avoided by a sale, if the insured retakes the same for non-payment of the price, and is in possession thereof at the time of the fire.

APPEAL from the parish court for the parish and city of New Orleans.

The case turned entirely on the construction to be given to a clause in the policy providing against any assignment or transfer of the property insured, on pain of nullity, without the consent of the insurers. The fact furthermore appearing that the property had been sold to one Frederick during the continuance of the risk, but which had also been taken back on account of the non-payment of the price, and was in the possession of the insured, as owner, at the happening of the event or fire which occasioned the loss.

There was judgment for the plaintiff in the sum claimed, and the defendants appealed.

Roselius for the plaintiff.

C. M. & F. B. Conrad for the defendants.

MORPHY, J., delivered the opinion of the court.

The plaintiff seeks to recover \$1,257.25 under a policy wherein defendants insured her against fire to the amount of \$3,000, on household furniture, liquors, bar-room fixtures, and billiard tables contained in a building situate at the corner of Champs Elysées and Levee Streets, for one year from the 2d of December, 1837. The record shows that after the date of the policy the property insured was sold to one Ursin Frederick and remained in his possession about six months, but that before the happening of the loss, the property reverted back to the plaintiff in consequence of the vendee's failure to pay for the same, and that plaintiff continued in the exclusive possession of it as owner until, within the term covered by the policy, it was damaged by fire. The policy under which the plaintiff claims contains the following clause: "The interest of the in-

¹ 19 Louisiana, 28.

sured in the policy is not assignable unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." It is contended that, from the very terms of this clause, the policy became absolutely void from the day of the sale to Frederick, and that it could be revived by no subsequent event.

The decision of this case must rest on the meaning and effect to be given to the foregoing clause inserted in the policy. It seems to us that its object was to render certain, by a positive stipulation, that which otherwise would have depended upon general principles and judicial decisions, to wit: that the policies of the company should not be obligatory any longer than the property insured continued in the individual named in the policy as owner, and that by the transfer of his interest the policy should be void; fraudulent claims upon fire offices have been so frequent that the character of the party proposing to insure has been deemed a matter of importance, and clauses resembling the one under consideration are now generally to be found in all policies of insurance. It is believed that the nullity they pronounce or imply, according to the terms used, is generally understood as relating to cases where the insured has absolutely and permanently divested himself of all interest in the subject matter of the insurance; being then without any interest at the time of the loss, the insured has sustained no injury, and the person to whom a transfer is made without the consent of the underwriters cannot recover, because he is not a party to the contract; thus the policy becomes inoperative and void. But the question here is whether it continues to be ineffectual when at the time of the loss the property is in the assured as it was at the time of the assurance. This policy was clearly intended to cover and did cover any furniture, liquors, fixtures, &c., which plaintiff might have in the house at any time during the continuance of the risk, not beyond the amount actually insured; if these articles had been partially and successively sold and replaced by others, or even if plaintiff had thought proper to provide for her bar-room an entire new set of the same articles, and a fire had taken place, the

Alienation. — Repurchase. — Effect of.

underwriters could hardly have pretended under the clause in question, that they were absolved from the obligation to indemnify; for their undertaking was to insure her from loss against fire, not on the identical effects existing at the time of the insurance, but on effects or articles of the same description that she might have in her establishment within the term covered by the policy. If notwithstanding such a partial or total sale of the effects insured, the policy would continue to be effectual on account of the subsisting interest of the insured at the time of the loss, there is no good reason why it should not be so in the present case. By the effect of the implied resolutory clause in her sale on credit to Frederick, plaintiff was restored to the possession and ownership of the property as if no sale or transfer had taken place; her interest, which had been parted with only on condition of her being paid the price, cannot be said to have absolutely terminated: During the time Frederick owned the effects, there was, it is true, a suspension of the risk, such as would have taken place had they been temporarily removed from the premises, but the risk revived as soon as the property reverted back to plaintiff. Of this the defendants cannot complain, because their liability was thereby diminished.

It is sufficient if the insured has an interest or property in the subject matter of the insurance at the time of insuring and at the time the fire happens. The nullity mentioned in the clause relied on by defendants was, in our opinion, intended and understood by the parties for the case where, by sale or otherwise, an absolute transfer or termination of the interest of the insured should take place so as to leave him without interest at the time of the loss; the stipulation was intended to protect the underwriters from risks they did not choose voluntarily to assume, and to prevent the insured from substituting to himself another person without their consent. La. Code, arts. 2040, 2537, 2542; 1 Phillips on Insurance, 34; *Lane v. Maine Mutual Fire Insurance Company*, 3 Maine Reports, 44.

It is therefore ordered that the judgment of the parish court be affirmed, with costs.

Quære: If the policy once became null by the act of the assured, as appears to have been the case at the moment of the alienation, how could it be restored to efficacy as a contract without the consent of the insurer? See *Hathaway v. Trenton Life Ins. Co.* 11 Cush. 448, and *Nightingale v. State Life Ins. Co.* 5 R. I. 38, — cases quite as strong for the assured as the above.

Practice. — Jury. — Fraud.

SAMUEL CAMPBELL, pursuer, vs. ABERDEEN FIRE AND LIFE ASSURANCE COMPANY, defenders.¹

(Court of Sessions, Scotland, June, 1841.)

Practice. — Jury. — Fraud.

In defence to an action for recovery of a sum under a policy of insurance against fire, it was, *inter alia*, pleaded that there was fraud in the original constitution of the contract: *Held*, in the circumstances of the case, that it was incumbent on the defenders either to take a special issue on the allegation of fraud, or to withdraw from the record the averment and pleas in law relative to that defence.

IN 1837, Samuel Campbell, merchant in Ayr, insured his house for £800, and his furniture and stock in trade for £2,000, with the Aberdeen Fire and Life Assurance Company. In 1838, the premises were burned down, and thereafter Campbell, who estimated his loss at £2,900 in the aggregate, raised an action for payment of the sum insured, offering deduction from his loss of what he might recover from the Scottish Union Insurance Company, with whom also he had effected an insurance, or an assignment of his right under the policy.

Defences were lodged for the insurance company, containing the following averments: "The pursuer's allegations as to the extent of loss sustained by him through the fire in question are, according to every inquiry which the defenders have been able to make, grossly and extravagantly overcharged. So much does this appear to be the case, that the defenders, however reluctantly, are constrained from all circumstances to believe and affirm that the claim put forward by the pursuer is fraudulently overstated. The defenders are in the same way compelled to infer and affirm that the original valuation of the premises and goods was also fraudulent, and that the contract generally was entered into by the pursuer with unfair and fraudulent views." And, *inter alia*, the following pleas were stated:—

1. The pursuer having failed to comply with the condition of the policy, by giving notice of the other insurances effected on his behalf, is, under the terms of that condition, precluded from recovering his alleged loss.

¹ 3 Cases in Court of Sessions, N. S. 1010.

2. The insurance libelled, having been fraudulently effected by the pursuer, is null and void, whether by common law or by the conditions of the contract.

3. The claim made by the pursuer having been fraudulently overstated is, under the conditions of the contract, wholly invalidated.

A record was made up, in which there were similar averments and pleas for the defenders.

The following issue was prepared by the jury clerks:—

“It being admitted that, on the 10th day of June, 1837, the defenders granted the policy of insurance, No. 5 of process, whereby, in consideration of a certain premium paid by the pursuer, the defenders agreed to insure a certain house, cellar, and store-room, with certain furniture and stock in the said house, shop, and store-room, the property of the pursuer, to the amount specified in the schedule hereunto annexed, against damage by fire, during the year from 1837, to 25th March, 1838:

“It being also admitted that, on the 2d day of January, 1838, the said buildings, furniture, and stock were consumed or damaged by fire,—

“Whether the defenders are indebted and resting-owing to the pursuer in all, or any part, of the sum or sums contained in the said policy, as the value of the buildings, furniture, and stock destroyed or damaged as aforesaid?”

The pursuer moved for an order upon the defenders either to take a special issue on their allegation of fraud in the original constitution of the contract, or to withdraw from the record the averment and pleas in law relative to the said defence of fraud.

The LORD ORDINARY pronounced the following interlocutor: “Finds that, in the circumstances of this case, it is incumbent on the said defenders to adopt one or other of the alternatives proposed; and appoints the cause to be enrolled, that the defenders may declare their election accordingly.”¹

¹ “NOTE. — The allegation of original fraud in the concoction of the contract might, no doubt, be well enough tried under the general issue of resting-owing, and perhaps without any great practical risk of disadvantage to the pursuer. But it is not imperative on the Lord Ordinary to send it to trial on that issue; and, considering the very awkward way in which the averment is here made, he does not think the defenders entitled to expose the pursuer to the slightest risk of

The defenders reclaimed.

LORD GILLIES. I am much inclined to adhere to the Lord Ordinary's interlocutor. The defence, as stated in the plea of law, is that the insurance libelled was fraudulently effected, and was null and void *ab initio*. There can be no doubt that the onus of proving this lies on the party alleging it. But there is something strange in the defence. There is nothing specific in the allegation; and as I do not understand fraud in the abstract, I waited for an explanation. The only explanation was, that the original valuation of the property was overstated. This does not satisfy me at all. I do not know how it is to be proved; but, at all events, there must be a special issue. The defenders plead that the contract was void *ab initio*, and they are bound to take an issue to that effect.

LORD MACKENZIE. I take the same view. I think the special issue is, in the circumstances, best, as there is a decided allegation that the contract was originally and intentionally fraudulent, and so was null and void. I think, with that alle-

such disadvantage, by mixing up a defence of this prejudicial character with their other averments, not as to the existence, but the due fulfilment of the contract. The allegation of original fraud is scarcely intelligible or practically relevant, unless followed up by an averment that the fire was wilful, or, at least, that a wilful fire was contemplated and intended by the pursuer when he entered into the insurance, especially when it is a separate ground of defence that the pursuer had other insurances on the same subjects, and was thus paying excessive premiums in more quarters than one, on the mere chance or hope of an accidental burning! The Lord Ordinary does not scruple to say, therefore, that he has the strongest possible impression that the allegation in question has been put on the record for no other purpose but to enable the defenders to make that most formidable and injurious charge by insinuation, and without the ordinary responsibilities which should attach to it; and he therefore thinks it just that they should either stand openly committed as the pursuers of a positive issue on that allegation of

fraud, or withdraw that prejudicial plea entirely from the record.

"He observes that, in the valuable work of the late Lord Chief Commissioner, an opinion of the highest practical authority in the law of England is recorded as to the necessity which may often arise of allowing special issues in cases like the present, in addition to the general issues of resting-owing. Mr. Tidd, in a letter engrossed a, p. 87 of the appendix to that work, observes, 'that it must be admitted that the general issue of resting-owing is of a very large and comprehensive nature, and may include a great variety of grounds of defence, particularly in cases on bills of exchange, policies of insurance, charter parties, &c.; and therefore it is not, I think, improbable, that, in these actions, cases may occur where it may be found right to use special issues, adapted to try the points in dispute between the parties.' To the Lord Ordinary it appears that the present is such a case, and that the defenders, if they are in earnest with their allegation, have no fair interest to decline to take a special issue in support of it."

Distance of Buildings. — Opinion.

gation on record, the demand of the pursuer for a special issue is fair and reasonable, in order that he may either be acquitted or condemned on such a charge. I agree with the Lord Ordinary, that under the general issue the question might be tried. The pursuer might, under such issue, lead evidence to show that the constitution of the contract was fair and proper; the defender might make his answer evidence on his side, and the pursuer might reply. But still, I think it is better and more just that the defenders in this case should take a special issue. As to the other plea as to the amount of the claim if the contract should not be found null, that may be conveniently tried under the general issue of resting-owing.

Lords PRESIDENT and FULLERTON concurred.

L. Mackintosh, S. S. C.; *Inglis & Donald*, W. S., Agents.

ISAAC DENNISON vs. THOMASTON MUTUAL INSURANCE COMPANY.¹

(Supreme Court, Maine, June Term, 1841.)

Distance of Buildings. — Opinion.

The answer to an inquiry as to the distance of other buildings stated, "East side of the block, small one story sheds, and could not endanger the building if they should burn." Held, that if this opinion was honestly entertained, it would not be a misrepresentation avoiding the policy, although the fire was in fact communicated through one of the sheds.

THIS was an action upon a policy of insurance against fire upon the plaintiff's dwelling-house and store, &c., in Washington Block, in the city of Bangor, bearing date Jan. 5, 1837.

On the trial of the cause before SHEPLEY, J., the plaintiff introduced the policy of insurance, which was in the usual form. Among the conditions of insurance referred to, and made a part of the policy, was this: "No insurance will entitle the insured to any indemnity for loss or damage, if the description by the applicant of the building or property insured be materially false or fraudulent; or if any circumstance material to the risk be suppressed," &c.

¹ 20 Maine (2 App.), 125.

Distance of Buildings. — Opinion.

In the application for insurance, in reply to the inquiry, "What distance from other buildings?" the answer given (so far as material to this case) was, "East side of the block, small one story sheds, and would not endanger the building, if they should burn." To the inquiry, "What are the buildings occupied for, that stand within four rods? how many buildings are there, to the fires of which this may be in any case exposed?" no answer given.

Warren Preston, Esq., called by the plaintiff, testified, that he was the agent of the insurance company when the policy was taken out; that the plaintiff called upon him to obtain insurance, and was informed that the company were not inclined to take property in the city; that he wrote to the company, stating generally the situation of the buildings, and received an answer, saying that "Mr. Dennison had better forward an application, to enable the president to decide understandingly;" that he handed the plaintiff a blank application to be filled up; that the plaintiff requested him, the witness, to fill it up, saying, he did not understand it; that he went with him into the building, and the back part, so that he could see all the buildings in the rear, and having seen them, he made out the answers to the questions; that both of them came to the conclusions therein stated; that he sent on the application and representation so made out and signed by the plaintiff, and received in return the policy which he handed to the plaintiff; that on Monday after the fire, the plaintiff came and notified him of the loss, and he, by his request, and within ninety days, wrote the company, stating the facts in relation to the loss.

It appeared from the testimony introduced by the plaintiff that fronting on Wall Street, and east of the building insured, stood a two story wooden building, about thirty by sixty feet, occupied for stores, belonging to one Prince; and that from the back wall of the building insured, to the rear of the wooden building designated as Prince's, the distance was fifty-nine feet; that north of Prince's, and separated by a passage of four feet, stood a wooden building belonging to one Call, which fronted on Wall Street; that the building insured fronted Main Street, was of brick, three stories on Main and four stories high in the rear towards Wall Street; that in the rear of the building, and

Distance of Buildings. — Opinion.

between it and Prince's, stood a one story woodshed; that northerly and adjoining stood another brick building, similar to the one insured, called Richard's building, and in the rear of that also a wooden shed; that the fire commenced in the second story of Call's building, and extended to Prince's, and thence to the wooden shed in its rear; that the fire took on the coving of Richard's building, from Call's building, and extended from thence to the plaintiff's; that the wooden shed in rear of Richard's building was on fire when the fire took first in Richard's building; that all these buildings were burnt except a wooden shed torn down; that there was but little air, except that caused by the fire; that it was ebb tide, and that the wells were not to be depended upon.

There was evidence, likewise, that all the wooden buildings were on fire when the coving caught. There was likewise testimony as to the condition of the fire department, and its exertions in relation to the extinguishing of the fire.

There was much evidence in relation to the fire, and the situation of the buildings; but as the facts sufficiently appear from the opinion of the court and the preceding statement, it is not fully reported.

A verdict was found for the plaintiff, subject to the opinion of the court whether the plaintiff, on this testimony, or so much of it as may be legally admissible, is entitled to recover; the defendants' counsel objecting to all that part of it relating to the condition of the fire department and its exertions, and the statements of its members and others relating to those matters. If the plaintiff is entitled to recover, judgment is to be entered on the verdict; and if entitled to recover interest from an earlier date than sixty days after the affidavit furnished and notice annexed, the verdict is to be amended accordingly.

Preble, for the defendants.

Rogers & Cutting, for the plaintiff.

WHITMAN, C. J. A verdict was taken for the plaintiff subject to the opinion of the court, upon a report of the judge, before whom the trial was had, of the evidence and rulings by him made in the progress of the trial. And it is agreed, that such judgment shall be entered, either upon the verdict or upon nonsuit, as the court may deem reasonable

The action is upon a policy of insurance against fire, underwritten by the defendants, on the dwelling-house of the plaintiff, situated in Bangor, which was consumed by fire. The defendants, for their defence, rely upon what they consider to have been a misrepresentation made at the time the policy was effected. The misrepresentation alleged is contained in the answer to a written interrogatory, propounded to the plaintiff, as to the distance of other buildings from the premises insured. The answer was in these words: "East side of the block are small one story woodsheds, and would not endanger the buildings if they should burn."

In evidence it appeared, that small sheds projected out from near the back part of the brick block of buildings (one of which was the house in question) twenty-four feet, being twelve feet in width, and eight feet stud; and leaving a passage-way, in the rear of them, of fourteen feet wide, adjoining some two story wooden buildings, standing on another street, forty-nine feet from the plaintiff's house, and in which the fire which consumed the plaintiff's house originated.

The first question which arises is, was this a misrepresentation, or was there a suppression of the truth tantamount thereto, and material to the risk? It does not seem to be necessary, in order to avail the defendants in their defence, that the misrepresentation or suppression of the truth should have been wilful. If it were but an inadvertent omission, yet, if it were material to the risk, and such as the plaintiff should have known to be so, it would render the policy void.

In the case at bar, it has now been rendered undeniable that the burning of the two story buildings on another street endangered the plaintiff's house; and to the interrogatory propounded it now would seem, that the existence of those buildings might, with propriety, have been stated. But this does not prove that, before the occurrence of the fire, it would have been deemed material to name them, as being near enough to put the plaintiff's house in jeopardy. It is not an unfrequent occurrence, after a disaster has happened, that we can clearly discern that the cause, which may have produced it, would be likely to have such an effect, while, if no such disaster had occurred, we might have been very far from expecting it. In this

Distance of Buildings. — Opinion.

case, it is essential to determine whether the plaintiff was bound to have known that a fire, originating in the two story wooden buildings, would have endangered the burning of his house. If, as a man of ordinary capacity, he ought to have had such an apprehension, then he ought to have named those buildings in reply to the interrogatory propounded; for, what a man ought to have known, he must be presumed to have known. His knowledge, in a case like the present, must have been something more than that, by a possibility, a fire, so originating might have endangered his house. This kind of knowledge might exist in regard to a fire originating in almost any part of a city like Bangor; for a fire, originating in an extreme part of it, if the wind were high and favorable for the purpose, might endanger all the buildings, however remote, standing nearly contiguous one to another, to the leeward of it. Any danger like this could not have been in contemplation when the interrogatory was propounded. Such buildings only as were so nearly contiguous as to have been, in case a fire should originate therein, productive of imminent hazard to the safety of the plaintiff's dwelling, could have been in view by the defendants. And the question is, were the two story wooden buildings of that description?

In reference to this question, it may not be unimportant to consider, that the defendants, at the time when this policy was effected, had an agent residing in Bangor, whose business it was to attend, in their behalf, to the applications for insurance from that quarter. It may be believed that the selection of this individual was the result of knowledge, with regard to his intelligence and capacity for such purpose. It was not, however, his business, perhaps, to prepare representations to be made by applicants for insurance. But it did so happen that he assisted the plaintiff in preparing the answers to the standing interrogatories before named, intended to produce a representation upon which to found the estimates of the propriety of assuming the risks proposed. He, it seems, examined the premises, looked at the woodsheds, and the two story wooden buildings beyond them. To him it did not seem to have occurred that the vicinity of those buildings was such as to render it necessary that the two story wooden buildings should be named in answer to

the interrogatory ; for he, at the request of the plaintiff, penned the reply thereto as he thought proper.

It does not appear that any witness has testified that, anterior to the disaster, he should have anticipated such an event as within the range of probability. What other individuals of intelligence did not foresee to be likely to occur, could not reasonably be expected of the plaintiff. And what he could not be expected to know, he cannot be considered as culpable for not knowing. And what he could not be expected to apprehend, he could not be bound to communicate ; and, in not communicating any such fact, he could not be considered as guilty of concealing it, even inadvertently, and much less wilfully.

As to the wooden sheds, they were named ; and the description given of them is precisely in conformity to the truth. They were named, however, in connection with an opinion, that if they took fire, they would not endanger the house. There is, then, no misrepresentation with regard to their existence. The misrepresentation complained of, in reference to them, is merely in matter of opinion. But opinions, if honestly entertained, and honestly communicated, are not misrepresentations, however erroneous they may prove to be. That this opinion was uttered *bonâ fide*, and in perfect singleness of heart and purpose, may well be believed, and may fairly be deducible from the fact, that it was expressed in concurrence with the unquestionable belief, at the time, of its correctness, by the confidential friend of the defendants. An opinion so uttered, if not in good faith, might well be complained of, as it might tend to throw the defendants off their guard. In such case, it might tend to show a fraudulent design ; and in connection with evidence of misrepresentation of facts, even short of what otherwise might be necessary to vacate a contract, would be likely to have that effect.

But it is by no means clear, if the fire had not originated elsewhere than in the sheds, that it would have been attended with essential danger to the main building. The neighbors and firemen of the city might be expected to be able to extinguish a fire so originating. Such buildings are easily pulled to pieces ; and an engine brought to bear upon them would do great execution. It may therefore, even now, be very question-

Reference. — Fraud.

able, whether the opinion complained of may not be adopted as well founded to a very considerable extent at least.

As to the testimony of the witnesses, touching the condition of the fire department and its exertions, and whatever relates thereto, we see no ground from thence arising, to question the correctness of the finding of the jury. The most that can be said of that part of the evidence is, that it is irrelevant, and not of a tendency to influence the jury one way or the other.

We are of opinion, therefore, that judgment must be entered upon the verdict with interest as agreed.

See *Gates v. Madison Mut. Ins. Co.* 2 *Jennings v. Chenango County Mut. Ins. Co.* Comst. 43, *post*; *Burritt v. Saratoga* 2 Denio, 75, *post*.
County Mut. Ins. Co. 5 Hill, 188, *post*;

LEVY vs. BROOKLYN FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, July Term, 1841.)

Reference. — Fraud.

A reference will not be ordered in an action on a policy of insurance, where the defence is fraud on the part of the insured. In such case parties are entitled to a trial by jury.²

THIS was an action on a policy of insurance against fire, tried at the New York circuit in March, 1841, before the Hon. Philo Gridley, one of the circuit judges. It appeared from the inventory of the plaintiff that the loss sustained by him was in furniture and glass ware — some of the property being totally destroyed, and another portion of it being partially damaged. The judge suggested that the cause had better be referred. On which, an officer of the insurance company made an affidavit that the trial of the cause would require an examination of the plaintiff's inventory, as well in respect to the goods, the amount thereof, the value of the portions totally destroyed, and of the portions partially destroyed, as in respect to the correctness of the account of the loss exhibited by the plaintiff, and thus that the trial would require the examination of a long account. In

¹ 25 Wend. 687.² See 6 Wend. 503; 10 Wend. 22; *Ib.* 110; 1 Hall, 560.

Assignment of Policy.

answer to which, the plaintiff made an affidavit that he was informed by the officers of the insurance company that their defence was two-fold: 1. That he had fraudulently caused the conflagration by which the property insured was injured; and 2. That in making up his statement of loss he had fraudulently over-estimated the amount of his loss, and thus had forfeited all claims upon the defendant. He further stated, that although the property destroyed or injured consisted of a variety of articles, differing in quality and value, yet his whole claim was founded upon a single occurrence, to wit, the injury done by the fire; that his counsel had offered, and he still was willing, to refer the cause to ascertain the true amount of his loss, provided the defendants would waive the defences of fraud in firing the premises and over-estimating the loss, both of which charges he pronounced utterly false, and therefore claimed a trial by jury. The circuit judges referred the cause, notwithstanding the opposition of the plaintiff, who now moved to vacate the order of reference.

J. L. Wendell, for the motion.

R. W. Peckham, *contra*.

The CHIEF JUSTICE said, that without attempting to lay down any general rule as to the reference of actions on policies of insurance, he was of opinion that, in a case involving such serious charges as were here brought against the plaintiff, a party was entitled to the benefit of a trial before a court and jury, and that therefore he would direct the order for reference to be vacated.

Ordered accordingly.

SMITH vs. THE SARATOGA COUNTY MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, July Term, 1841.)

Assignment of Policy.

A fire insurance policy contained a provision, that "the interest of the assured in this policy is not assignable without the consent of the company in writing; and in case of

¹ 1 Hill, 497.

Assignment of Policy.

any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void." The assured assigned the policy, but not the property insured, without the consent of the company. *Held*, that the policy was avoided.¹

THE case is sufficiently stated in the opinion.

J. A. Spencer, for the plaintiff.

M. F. Reynolds, for the defendants.

By the Court, BRONSON, J. The point was specially taken, that the plaintiff could not recover without showing that the defendants had consented to the assignment of the policy, or had in some way waived their right to make the objection. The judge decided the point against the defendants, and they excepted to his opinion. This presents the broad question, whether an assignment of the policy without the consent of the company rendered the contract void. The clause of the policy touching this question is as follows: "The interest of the assured in this policy is not assignable without the consent of the said company in writing, and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall thenceforth be void and of no effect." I have felt some difficulty in the construction of this clause, and have tried to read it, as the plaintiff's counsel reads it, so that it will apply to the plaintiff's interest in the subject insured, and not to the contract. But the language is, that the "policy is not assignable," and as the condition is a sensible one as it stands, I do not see how we can substitute another word without making a new agreement for the parties. And besides, there was no occasion for a condition rendering the contract void on an assignment of the subject insured, for it had been so expressly provided by the charter of the company. Stat. 1834, p. 532, § 10. The insured is a member of the company, not only by the charter (§ 2) but by the express terms of the policy.

If we could separate the clause into two parts, and make the last branch apply to the subject, while the first applies to the policy, the plaintiff might, perhaps, succeed. We should then have a declaration, that the "policy is not assignable without

¹ Affirmed 3 Hill, 508. See *post*.

Assignment of Policy.

the consent of the company," but not followed by nullifying words,—those words, as they stand in the clause, applying in the supposed case to the subject only. But I do not see how we can separate the clause into parts in this way. The parties seem to have been speaking of the same thing throughout, to wit, the policy. The form of expression is the same in the last as it is in the first branch of the sentence, and they are tied together by a copulative conjunction. "The interest of the assured in this policy is not assignable without the consent of the said company in writing, and in case of any transfer or termination of the interest of the assured" [the interest already mentioned, to wit, in the policy] "without such consent" [consent to the assignment of the policy], the contract shall be void. There is a further reason for supposing that the parties were all along speaking of the policy, and not the subject, because, as we have already seen, the character of the company renders the policy void when the subject is assigned, and there was no occasion for saying anything on that point in the contract. The case then comes to this: The parties have agreed that the contract is not assignable without the consent of the company, and that in case of a transfer without such consent, the policy "shall thenceforth be void and of no effect." The assured has assigned without such consent, and it seems to follow as a consequence that the policy is "void and of no effect." However strongly we may desire to get rid of this conclusion, I do not see how it can be done. The parties must abide by the contract they have made. It has been ingeniously argued, that as the policy is declared "not assignable," it is the assignment, and not the policy, which is void. But, in its own nature, the policy is assignable, so as to pass an equitable interest to the assignee; and by express stipulation, also, the policy may be assigned, provided the written consent of the company is obtained. It is not assigning merely, but assigning without consent, which is forbidden. And besides, the plaintiff's argument is all built on the first part of the clause, while, as has already been seen, we must look at the whole of it; and doing so, it then appears that the parties not only contemplated a "transfer" of the policy, but a transfer without consent; and they provided

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for that particular case, by declaring that the policy, not the assignment, should "thenceforth be void."

NELSON, C. J., and COWEN, J., being members of the company, gave no opinion.

New trial granted.

Upon a subsequent trial of this case in the supreme court, the following opinion was delivered: ¹

By the Court, BRONSON, J. I still adhere to the opinion already expressed (*supra*), that it is the policy or contract of insurance, and not the subject insured, which the parties have declared not assignable. It is undoubtedly true that "the interest of the assured," when the words are used without any qualification, usually means his interest in the property or thing insured. But here the parties have explicitly declared that they mean something else — "the interest of the assured in this policy is not assignable."

It is now said that, as the plaintiff in his written application for insurance expressed the wish to assign, and as the policy was subsequently issued referring to the application, the company has, in effect, consented in writing — that is, by the policy — to an assignment. But the language of the policy is not that you may, but that you shall not assign without the consent of the company. The most that can fairly be inferred from the issuing of the policy with the knowledge that the plaintiff wished to assign is, that the defendants were ready to consent to an assignment to the mortgagee on the terms mentioned in their by-laws; that is "on his signing the premium note, or giving security for the payment of the same." Before the loss happened, the mortgagee did not think proper to take on himself the burden of the contract by signing the premium note, and he cannot complain if the defendants now insist that the contract is at an end.

The remaining argument for the plaintiff presents a question which was not before in the case. It is said that the defendants, by making and collecting assessments upon the premium note after they

had notice of the assignment of the policy, have waived the forfeiture, and affirmed the continuance of the contract. And this is likened to the case where a landlord, after notice of some act or omission by his tenant which gives a right of re-entry, receives or distrains for the subsequently accruing rent, or does some other act by which he plainly affirms the continuance of the lease. This is held to be a waiver of the forfeiture. But this doctrine only applies where the act or omission of the tenant renders the lease voidable, and not where it is declared absolutely void on the happening of the particular event. The distinction is between cases where the landlord may put an end to the lease by an entry for the wrong done, and those where the wrong terminates the lease without any act on the part of the landlord. In the former case, the landlord may waive the forfeiture by any act which affirms the continuance of the tenancy; but in the latter, the lease being *ipso facto* void is incapable of confirmation. *Pennant's case*, 3 Co. 64, third resolution; *Finch v. Throckmorton*, Cro. Eliz. 221; *Mulcarry v. Eyres*, Cro. Car. 511; *Anon.* 3 Salk. 4. And see Co. Litt. 295, b; *Rickman v. Garth*, Cro. Jac. 173; *Jones v. Verney*, Willes' Rep. 169, 176, 177; *Jenkins v. Church*, Cowp. 482; *Doe v. Watts*, 7 T. R. 79; *Doe v. Rees*, 4 Bing. N. C. 384; *Goodwright v. Davids*, Cowp. 803. Now in this case the provision is, that on assigning without consent "this policy shall thenceforth be void and of no effect." The parties have in the strongest terms declared that the policy shall immediately, and without any act on the part of the company, become absolutely void; and it is difficult to see how anything short of a new creation could impart vitality to this dead body.

We are also referred to cases where it

¹ 3 Hill, 508.

Insurable Interest. — Tenant by Curtesy. — Joint Tenant.

has been held that the contract of an infant may be confirmed after he attains his majority. But with very few exceptions the contracts of infants are only voidable—not absolutely void; and wherever the contract is good or bad at the election of the party, there is no difficulty in seeing that it may be ratified and confirmed.

But it is unnecessary to put this case upon the ground that the forfeiture could not be waived. It does not appear that the assessments which the plaintiff has been required to pay on his premium note were made on account of losses which have happened since the policy was assigned; and consequently the defendants have not done an act which necessarily affirms the continuance of the policy. There is, perhaps, room for question whether the plaintiff did not continue liable upon his premium note to contribute to all losses which happened within the term for which he was originally insured, although the policy became void before the term ended. See premium note [3 Hill], p. 509, in connection with Sess. L. of 1834, p. 530. §§ 2, 4, 7, 8, 10; *Herkimer M. & H. Company v. Small*, 21 Wend. 275. But however that may be, there can be no doubt that the plaintiff was liable to contribute to all losses which happened while the policy was in force, although the as-

essment should not be made until afterwards. He could not, by forfeiting the policy, discharge the existing liability to contribute towards losses which had already happened.

The case then comes to this: The defendants proved that before the property was destroyed, the plaintiff had done an act which put an end to the policy. In answer to this, the plaintiff undertook to show that the forfeiture had been waived. The burden lay upon him, and he was bound to make out a plain case. It was not enough to bring the matter into doubt. It was necessary to show that the company had done an act which plainly affirmed the continuance of the policy. An assessment for losses did not prove it, without showing that the losses happened after the forfeiture accrued, and there was no attempt to establish that fact. The judge was therefore right in holding that the plaintiff could not recover.

As to the question of waiver, see *Firley v. Lycoming Co. Ins. Co.* 30 Penn. St. 311 (1858); *Diehl v. Adams Co. Ins. Co.* 58 Penn. St. 443 (1868); *North Berwick Co. v. New Eng. Ins. Co.* 52 Me. 336 (1864); *Carroll v. Charter Oak Ins. Co.* 38 Barb. 402 (1862).

New trial denied.

**THE FRANKLIN MARINE AND FIRE INSURANCE COMPANY vs.
JAMES G. DRAKE.¹**

(Court of Appeals, Kentucky, September 25, 1841.)

Insurable Interest. — Tenant by Curtesy. — Joint Tenant.

The husband of one of several joint owners of real estate, may have an insurable interest in his wife's portion, as tenant by the curtesy.

In such case he may recover the whole amount insured to him, not exceeding the loss; and not merely the value of his own interest in the premises.

The insurance to one joint owner is not made void by a subsequent insurance by the other owners or their interest, without notice to the first company.

EWING, J. This is an action of covenant instituted by Drake against the Franklin Insurance Company, to be indemnified

¹ 2 B. Monroe, 47.

for a loss occasioned by fire, upon a policy effected by him with the company, on two fifths of three three story brick houses in Louisville. The case was submitted to the circuit court on an agreed statement of facts, and a judgment rendered for the plaintiff, for the whole amount insured, with interest from the time payment should have been made, according to the terms of the policy, and from this judgment the company has appealed to this court.

So many of the facts agreed as are necessary to a determination of the points involved in this controversy, are the following:

General Robert Breckinridge owned the three houses, on the two fifths of which Drake effected his policy, together with other estate, and devised the one moiety thereof to James D. Breckinridge, in trust for his daughter, and the other moiety to Maria Breckinridge, in trust for the five children of Henry Breckinridge. In a division of the estate, the three houses fell to the children of H. Breckinridge, of whom Drake married one named Margaretta, and Robert, another, sold his interest to her, by which she became entitled to two fifths of the three houses. Drake and his wife had a living child. In this condition of the estate, the naked legal title still remaining in Maria Breckinridge, Drake, on the 20th of December, 1839, effected with the appellants an insurance of his two fifths in said houses for one year, viz: \$1,333 $\frac{1}{3}$ on each house, amounting in all to \$4,000. Subsequent to the insurance by Drake, to wit, on the 3d of January, 1840, Mrs. Maria Breckinridge, as trustee, effected an insurance for one year, on the three houses, with the Spring Garden Insurance Company, by a policy containing the following language: "Witnesseth that the Spring Garden Fire Insurance Company have received of Maria Breckinridge, Trustee, &c., seventy-six dollars premium for making insurances upon the property herein described, viz.: ten thousand dollars on three three story brick houses, occupied, &c., situated, &c., to wit: \$3,333.33 $\frac{1}{3}$ on each building, \$10,000, at $\frac{3}{4}$ per cent. and policy, \$76."

This policy was effected without the authority, consent, or knowledge of Drake, nor had he any notice of it until after the buildings were consumed by fire, which happened in April,

1840, and was no party to an adjustment made between Mrs. Breckinridge and the Spring Garden Company, whereby she received \$8,571.50, and claiming to have insured for the three fifths only of her infant *cestuis que trust*, applied the whole amount towards rebuilding houses on the ground which afterwards, in a division between them and Drake and wife, was allotted to them, and Drake and wife received no part of it.

It was agreed that the houses, when consumed, were worth \$12,000, and they were then renting at \$3,600 a year, payable quarterly. It was proven by Mrs. Breckinridge and James Marshall, the agent of the Spring Garden Company, who drafted the policy for Mrs. Breckinridge, that the insurance was intended to cover the interest of the three younger children only, and that application was made to insure for their three fifths only, and the agent notified at the time, that Drake had insured his two fifths at the Franklin Office, and she desired to insure at \$10,000, for the other three children. The competency and sufficiency of this evidence was objected to by the counsel of the defendant, and the whole matter submitted to the court.

The sixth article of the printed terms of the Franklin Office, annexed to Drake's policy, contains the following provision :—

“ VI. Persons insuring property at this office must give notice of any other insurance made on their behalf on the same, and cause such other insurance to be indorsed on their policies, in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained ; and unless such notice is given, the insured will not be entitled to recover in case of loss.” And a similar article is contained in the printed proposals of the Spring Garden Office.

Upon these facts several questions are raised.

1st. Had Drake any insurable interest ?

2d. Placing the second insurance, or that effected by Mrs. Breckinridge, out of the question, had he a right to recover the full value of the two fifths of the houses destroyed, not exceeding the amount, to be regulated by the amount of his individual interest in the houses ?

3d. Is his policy forfeited by his failure to give notice of the policy effected by Mrs. Breckinridge ? And —

4th. Can he recover, in his policy, the whole amount insured, or only a ratable amount of his loss ?

I. Drake had unquestionably an insurable interest in the two fifths, and had a right to effect the policy. He had a right to the use and enjoyment of the premises or their rents, during the joint lives of himself and wife, and by the statute (1 Stat. Law, 444) would be tenant, by the curtesy, after the death of his wife. *Columbian Insurance Company v. Lawrence*, 2 Peters Rep. 43: 1 Phillips on Insurance, 26; 2 Ib. 222, 223, and 278.

II. We are equally clear, if his claim be unaffected by the second insurance, that he has a right to recover the whole value of the two fifths in the houses destroyed, not exceeding the amount of his insurance.

If the assured had an insurable interest at the time of the insurance, and also at the time of loss, he has a right to recover the whole amount of damage to the property, not exceeding the sum insured, without regard to the value of the assured's interest in the property. The amount of the recovery will depend on the interest intended to be insured, provided it be covered by the policy. A mortgagor who has mortgaged to the full value of the property, and whose equity of redemption has been sold under execution, provided he has, at the time of the loss, a right to redeem; or a lessee for years whose lease is upon the eve of expiring at the time of the loss, is entitled to recover the full value of the property destroyed, not exceeding the sum insured. 2 Phillips on Insurance, 222, 278; 1 Ib. 41, and the authorities referred to.

The undivided two fifths in the houses was intended to be insured, and was covered by Drake's policy, to the amount of \$4,000, and he had an insurable interest at the date of the policy, and also at the time of the loss, and had a right to recover the full value of the interest in the houses, not exceeding the amount of the sum insured.

III. We are equally clear that his policy is not forfeited. It is contrary to the principles of justice, and cannot be deemed to have been within the contemplation of the parties, or to be required by any proper interpretation of the sixth article, that he should be made to forfeit his whole policy for a failure to give notice of that which was done by another, without his privity or consent, and of which he had no notice himself.

IV. And though the language of the sixth article, "any insurance made on his behalf," is broad in its terms, and in its literal import is not confined to an insurance effected by himself, or at his instance, yet we cannot believe that it was the intention of the parties, or that the article should be so construed, as to apply to any other insurance than those effected by himself or by his authority, expressed or implied, or subsequent sanction. 2 Phillips on Insurance, 225. If so, then might he, by the act of another, without his knowledge or consent, and even against his will, be made either to forfeit his whole policy for a failure to give notice, or be driven to abandon his own contract upon which he relied for indemnity, as to one half or more, and to seek indemnity against another office which might prove to be insolvent, and upon a policy which he had no hand in effecting.

The stipulation, requiring notice to be given, implies that no other policy was meant than one that was or should be effected at his instance or upon his authority.

Of such policies he must have notice, and having notice, might be required to give it to the office at which he had insured. But if the subsequent insurance, effected on his account by another without his knowledge or sanction, be embraced by the terms of the article, then is he required to do that which it is impossible for him to do, and, by the literal terms of the article, subjected to a forfeiture of his policy for his failure to do it. We cannot sanction such a construction.

Mrs. Breckinridge, who was invested with the naked legal title, had the right no doubt, and it might have been her duty to insure for her three infant *cestuis que trust*, but it was not her duty, and we are not prepared to concede that it was her right, to insure for Drake, without his consent, after she was apprised that he had effected an insurance at another office. And if she had no right, then her insurance without his knowledge, authority, or subsequent recognition, would not be such an insurance as is embraced within the terms of the sixth article, according to our interpretation of it.

But, conceding that she had a right to insure, we are satisfied that the proof is entirely sufficient to establish the fact that she intended only to insure the infants' three fifths, and did not

intend to insure for Drake's interest. And that the policy, if construed to embrace it, being drafted in a hurry, late in the evening, as is proven by Marshall, the agent, was made to embrace it by mistake. And we are equally clear that the proof is competent.

Though in a controversy between Mrs. Breckinridge and the Spring Garden Office, it might be incompetent for the parties at law to set up and establish the mistake by parol proof, we cannot doubt that even between them a court of chancery might afford relief. And if so, and it be conceded that Mrs. Breckinridge's policy imports an insurance of the whole interest, we are not prepared to concede that Drake might not, in reply to the defence set up by the Franklin Company, that another insurance had been effected on his behalf, set up and establish by parol proof, that the insurance was not intended to embrace his interest, and was made to embrace it by mistake. If he could not, then might he be deprived of the full benefit of his own contract, not only without his own authority or consent, but without the intentional act even of Mrs. Breckinridge.

But there is nothing in the terms of Mrs. Breckinridge's policy which necessarily imports that she did insure the whole property.

She, "as trustee," &c., without stating for whom, "insures ten thousand dollars on the houses," without stating on what interest in the houses, or whether on the whole or on a part, on the interest of the infants alone or on their interest as well as the interest of Drake.

Now, as it was her duty to insure for the infants, and unquestionably not her duty to insure for Drake, after he had insured, it might be fairly implied that she insured that interest only which it was her duty to insure, and not an interest which it was not her duty to insure, and which, after she had notice of the prior insurance, it is questionable whether she had the right to insure without authority. There being nothing in the policy absolutely implying that the whole was insured, and nothing in its terms which would necessarily lead the mind of Mrs. Breckinridge, when she effected the policy, to the conclusion, that the whole interest was insured, we are of opinion that there is no such absolute repugnance between the terms of the policy and

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the parol proof, as to render it incompetent to establish the fact of the interest insured or intended to be insured.

Judgment of the circuit court affirmed with costs, &c.

Crittenden & Wolfe, for appellants.

Guthrie, for appellee.

ALEXANDER WILSON vs. DAN HILL.¹

(Supreme Court of Massachusetts, October Term, 1841.)

Assignment of Insured Property. — Rights of Assignee.

If an insurance company pay a loss to a mortgagee of the insured, according to the terms of the policy, and such mortgagee pays over to the assignee in insolvency of the insured the surplus of the insurance money above his mortgage debt, such assignee is not liable in law for such money to one who has bought the interest of the insured in the property covered by the policy, subject to said mortgage; there having been no assignment of the policy to such plaintiff.

An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is, in effect, a contract of indemnity with the owner, or other person having an interest therein, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain in case the property is destroyed. If, therefore, the assured has wholly parted with his interest before the loss, the insured incurs no obligation to anybody; not to the assured because he has sustained no damage; not to the purchaser, because in the absence of an assent to an assignment of the policy to him, there is no contract to indemnify him; because the policy is not incident to the estate, and does not run with the land.

But after a loss, the insured may assign his right to recover the insurance money, which will give the assignee an equitable interest and a right to recover the same in the name of the assignor, subject to any set-off and other equities against him.

THE firm of Benson, Phelps & Capron owned certain land, buildings, and machinery, subject to a mortgage by said Capron to Arnold & Chadsey of his undivided third, to secure \$5,000, and to a second mortgage by said Benson & Phelps of their undivided two thirds to Whitney, to secure \$1,721. In January, 1838, said Benson, Phelps & Capron procured insurance thereon to the amount of \$2,700, payable in case of loss to the firm of Hill & Chapin, who also had a mortgage on the machinery. In April and May following the plaintiff bought all the interest of said Benson, Phelps & Company in said property, subject to the said mortgages thereon.

¹ 3 Met. 66.

In July, 1838, the property was destroyed by fire, and in October following said Hill & Chapin received the said sum of \$2,700 from the insurance company, according to the terms of the policy. The defendant, Dan Hill, being subsequently appointed assignee in insolvency of the firm of Benson, Phelps & Capron, under St. 1838, c. 163, recovered of said Hill & Chapin the balance of said \$2,700, insurance money, above their mortgage debt, viz.: \$626.21. The plaintiff then procured an assignment to him of the mortgage of Benson & Phelps to Whitney, having before the fire obtained an assignment of the other mortgage to Arnold & Chadsey, and brought assumpsit for money had and received against said Dan Hill, the assignee in insolvency of Benson, Phelps & Capron, claiming it to have been received to his use. The case was submitted to the court upon these and other facts, which are not material. The reporter's statement and marginal notes are omitted.

Merrick, for the plaintiff.

C. Allen & Chapin, for the defendant.

SHAW, C. J. There are so many decisive objections to the plaintiff's right to recover, that it appears difficult to select the most prominent. Even if the plaintiff had any interest in the loss under this policy, and any right to claim the amount of the insurance company, or of their assignees, Hill & Chapin, he would have no right to follow the money into the hands of the defendant. Dan Hill, the defendant, has been duly and legally appointed the assignee of Benson, Phelps & Capron, the original assured, and, in this capacity, and in behalf of the creditors, he demanded the balance of the money in the hands of Hill & Chapin, as a sum due to the insolvent debtors, whom he legally represented; brought an action for that balance, and recovered it, under a judgment. He cannot be considered as having received it to the use of the plaintiff; there was no privity, in fact or in law, between these parties. If Hill & Chapin were liable to the plaintiff for the same money, they paid it to the defendant in their own wrong, and such payment would have been no defence against the action of the plaintiff, if he were legally entitled to it.

But it appears to us, that the claim of the plaintiff to recover in this action is founded upon an entire misapprehension of the

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nature and legal effect of a contract of insurance. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is in effect a contract of indemnity, with an owner, or other person having an interest in the preservation of the buildings, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain, in case they are destroyed or damaged by fire. If, therefore, the assured has wholly parted with his interest, before they are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken. If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser, and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet expired, are a good consideration for such promise, and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitute a new contract, on which the assignee may sue in his own name. *Mowry v. Todd*, 12 Mass. 281.

For the general principles herein stated we would refer to the authorities cited by Mr. Chapin: *Lynch v. Dalzell*, 3 Bro. P. C. (1st ed.) 497; *The Sadlers' Company v. Badcock*, 2 Atk. 554; *Marshall on Ins.* (3d ed.) 800–807; *Carroll v. Boston Marine Ins. Co.* 8 Mass. 515; *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 397.¹

These considerations, however, do not apply to a case where the assured, after a loss, assigns his right to recover that loss; it would stand on the same footing as the assignment of a debt or right to recover a sum of money actually due, which, like the assignment of any other chose in action, would give the assignee an equitable interest, and a right to recover in the name of the assignor, subject to set-off and all other equities.

¹ See these cases *ante*, vol. 1, pp. 1, 7, 576.

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All the considerations, applicable to the assignment of a personal contract of indemnity, apply with still greater force to a case of mutual insurance, where each and all the members have an interest in knowing their associates and in deciding who shall become members. In the present case, even if the general principle were less clear, there is a provision in the by-laws, which are referred to as part of the contract (art. 12), that "any person, selling his property, may surrender his policy and receive back his deposit note;" a clear implication, that the right to the benefit of the insurance does not pass with the estate to the purchaser. The principle of the contract is mutual indemnity. After such a sale and transfer of the estate, who is to stand responsible to other members for their losses, during the continuance of the unexpired policy? Not the seller; because the consideration, on which he became liable, has ceased, and his notes are cancelled and given up, and his obligation discharged. Not the purchaser; because he has never given any note pursuant to the by-laws and terms of the contract, nor in any way bound himself to contribute to the losses of others of the company.

Besides; indorsed on the policy, or annexed to it, is a blank form, first of a formal written permission, to be executed by the officers of the company, authorizing an assignment of the policy, and the form of an actual assignment by the assured. This operates, at least by way of notice, that the policy was not to be assigned without the expressed consent of the company.

But whatever might have been the effect of an assignment, either before or after the loss, and either at law or in equity, in fact no assignment was ever made by Benson, Phelps & Capron to the plaintiff; and he can only claim, therefore, as assignee in law, in consequence of having been purchaser of the estate; which has already been considered.

But then it is contended, that at the time when the company paid the amount of the loss to Hill & Chapin, for the original parties insured, in consequence of their transfer of the estate, before the loss, they could not legally recover, and therefore the money was voluntarily paid by the company, and must be deemed to have been paid, subject to the prior lien of Hill &

Double Insurance. — Notice of. — Oral Evidence.

Chapin, the agents, equitably for the use of the plaintiff, who had become purchaser of the estate. I do not think we have the facts stated with sufficient fulness and accuracy to enable us to judge whether the assured had parted with all their interest, at the time of the loss. It is stated, that the plaintiff had purchased the estate, subject to the mortgages. If the assured remained still liable to the payment of the debts for which those mortgages were given as collateral security, then they still had an interest in the estate; because a fire would impair or destroy the value of the property appropriated to the payment of their debt; and they therefore had an interest in its preservation, covered by the policy. One of the mortgages on the property was not assigned to the plaintiff till after the loss. Nor does it appear that the assured had been exempted from the payment of any of the mortgage debts. We cannot therefore say with confidence that at the time of payment by the company they were not legally liable for such payment. At all events, they yielded to a claim of right, and paid to Hill & Chapin, pursuant to the provisions of the terms of the policy, to enure to them, to the extent of their lien; and as to the balance, to the use of their principals. There are no facts on which to raise an implication that they voluntarily paid, upon considerations of policy, or intended to pay anything to the use of the owner of the estate, or that they had any regard, in such payment, to any supposed equitable claim of the present plaintiff.

Plaintiff nonsuit.

See Carpenter v. Providence Washington Ins. Co. 16 Pet. 495, post.

STACEY vs. THE FRANKLIN FIRE INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, December Term, 1841.)

Double Insurance. — Notice of. — Oral Evidence.

The circumstances attending the insurance in this case *held* admissible to show that there was not a double insurance.

A clause in a policy of insurance requiring notice of any insurance made in any other office, *held* to apply to subsequent as well as to prior insurance.

¹ 2 Watts & Sergeant, 506.

Double Insurance. — Notice of. — Oral Evidence.

A clause in a policy forbidding other insurance without the consent of the present company does not affect a prior insurance if the later policy could not have been enforced at any time.

Information by the insured under the later policy that he has another policy, but adding that it was issued to cover other property, would not make the second company liable under the clause last mentioned.

THE case sufficiently appears in the opinion of the court.

T. I. Wharton (with whom was *J. S. Smith*), in support of the motion for a new trial.

Meredith & J. Sargeant, contra.

The opinion of the court was delivered by

ROGERS, J. This is an action of covenant on a policy of insurance for \$10,000 against fire, dated the 26th of July, 1833, for a premium of \$22 for one year from the date, "upon merchandise generally, including liquors and groceries contained in the store No. 37 South Wharves, for account of whom it may concern, say merchandise without exception." The 7th of January, 1834, merchandise included in the policy, to the value of \$13,000 and upwards, was destroyed by fire. The plaintiffs claim for a total loss; and inasmuch as the full premium has been paid to the defendants, the plaintiffs are entitled to recover, unless something has occurred subsequently which alters the relative situation of the parties. The defendants deny that they are liable for a total loss, but admit that they are responsible for two fifths of the loss, amounting to \$5,400, which has been already paid. In support of this position the defendants say that the plaintiffs, subsequently to the date of their policy, viz.: on the 22d of November, 1833, effected a policy of insurance against fire for \$15,000 with the North America Insurance Company of Philadelphia, upon the same goods, in the same store, for the period of four months then next ensuing. That consequently, according to the sixth condition, which is part of the policy, and which is in the following words: "that persons insuring at the Franklin Office must give notice of any other insurance *made* on their behalf by the same, and shall cause such other insurance to be indorsed on their policies; in which case each office shall be liable to the payment only of a ratable proportion of any loss or damage which may be sustained; and unless such notice is given, the insured will not be entitled to recover in case of loss;" they are liable to an average loss

only. If the latter insurance was on the same goods, it is not pretended that any notice was given ; but of this the defendants take no advantage, but have already paid their proportion of the loss ; but they insist that this is the extent of their liability. In answer, the plaintiffs contend, first, the clause in the policy of the Franklin Office does not apply, because, by the terms of the condition, on which reliance is had, it is not required to give notice of a subsequent policy, but of an insurance *made* at the time of effecting the insurance ; or, in other words, applies only to a prior and subsisting insurance. Secondly, that to avoid the first policy, the latter must be such a policy as would enable the plaintiffs to recover upon it ; and thirdly, they deny that the second was a policy on the same goods.

It is admitted that the plaintiffs are entitled to an indemnity to an amount equal to \$10,000, either from the defendants or in a ratable proportion from the defendants and the North America Insurance Company. This is therefore substantially a contest between the respective underwriters, as to their proportion of the loss ; and the plaintiffs, with a show of reason, complain that they are made the victims of a lawsuit with which they ought to have no concern. It is nothing to them whose fault it is, as it is very certain that if there had been that spirit of accommodation and fair dealing which ought to actuate those companies, and which it were their interests to observe, they would not have been placed in this unpleasant predicament. The controversy might have been settled, as it was just and right it should be, in a suit between the conflicting underwriters. So much was I struck with the obvious injustice of this proceeding, that, at the first argument, I was of the opinion, and I still remain so, that the plaintiffs were at all events entitled to recover from the defendants, as for a total loss, leaving the defendants to their remedy against the North America Insurance Office. And such at one time was undoubtedly the law, for on a marine insurance, if the policy contains no stipulation upon the subject, the insured may insure with different underwriters to any amount, and recover indemnity from any of the underwriters. It is well settled that upon a double insurance, though the insured is not entitled to two satisfactions, yet in the first action he may recover the whole sum insured,

leaving the defendant to recover a ratable satisfaction from the other insurers. In such cases, the two policies are considered to make but one insurance. The assured may sue the underwriters on both policies, but he can recover only the real amount of his loss, to which all the underwriters shall contribute in proportion to their several subscriptions. He can receive but one indemnity, but the different underwriters are made sureties for each other. But it is said that the clause in the policy to which reference has been made alters the law in this respect, and exempts the underwriters from any more than their proportion of the loss. This idea has taken its rise from an observation of Mr. Condry, in his edition of Marshall on Insurance, page 152, who, speaking of the case of *Thurston v. Koch*, 4 Dall. 348, which was a marine insurance, says: "This decision being contrary to the practice of the merchants in Philadelphia, a clause was added to the policies effected there, which, it is believed, has been generally followed in the United States, by which it is expressly stipulated that the loss shall be paid by the different policies, according to their respective dates, first exhausting those of the earliest dates." This and a *dictum* in *Peters v. The Delaware Insurance Company*, 5 Serg. & Rawle, 481, which is also a marine insurance, is all the authority that we have for the prevalent notion that the assured can recover no more from the first underwriter, who has received a full premium, than his proportion of the loss, when the property is doubly insured. In the case of *Thurston v. Koch*, the English rule was adopted (contrary to the rule on the Continent), that where a double insurance is made, and the underwriters in the first policy pay the whole loss, they are entitled to recover from the underwriters in all subsequent policies on the same risk a ratable proportion, which shall divide the loss equally among all the underwriters on the same risk, without relation to the date of the policies or the time of subscribing. The first underwriters had paid the whole loss, and the question was whether a subsequent underwriter was liable to pay more than the amount of the loss beyond the sum previously insured. The court decided that he was, adopting the English rule, that upon a double insurance, though the insured is not entitled to two satisfactions, yet upon the first action he may recover the whole

sum insured, and may leave the defendant therein to recover a ratable satisfaction from the insurers. A recovery may be had of the first and subsequent underwriters, and those who pay the loss may demand a proportionable contribution from the other insurers. The different underwriters were in effect made insurers for each other. "And this," says Phillips, in his treatise on the Law of Insurance, citing 5 Serg. & Rawle, 475, "is one reason for introducing the clause respecting prior insurances."

It does not appear to me, from a fair interpretation of the clause in a fire insurance, it was intended to alter the right to recover against the first underwriter the whole loss, according to the agreement, leaving him to recover against the subsequent underwriters their ratable proportions. It was intended to prevent fraud, and also from being insurers for each other, which is the effect of recovering from any one of the underwriters without regard to date; and as is said in 5 Ohio Rep. 467, to apprise the assurer of his right to claim a contribution from his co-insurers. And this, rightly understood, is the opinion of Mr. Condry, who says that under this clause the loss shall be paid by the different policies, according to their respective dates, first exhausting those of the earliest. They are only liable to their ratable proportions, as between themselves, nor can the assured select a subsequent underwriter, so as to throw the whole loss on him. If the underwriters intended to make such an entire revolution in the law, as to declare that they would not be liable according to the contract to the assured, who had paid a full premium, the intention should have been expressed in much more express and unambiguous terms. A double insurance is not to be discouraged, except as an instrument of fraud; but where the transaction is fair, it can have but one effect on a prior underwriter, and that a beneficial one, by enabling him to recover from a subsequent insurer an average proportion of the loss. It is but fair, however, to say that this is my opinion only. The cause will be put on other grounds.

The second ground is, that the condition applies to a prior and not a subsequent insurance. And, in the absence of all authority, I should have inclined to that opinion, because where an insurance company uses ambiguous language, capable of different grammatical constructions, it should be construed in

the sense most favorable to the assured. But words precisely similar in a policy have received an interpretation in a sister state, and as it is desirable that the rules which regulate the commercial intercourse of citizens of the Union should conform to each other as nearly as possible, I do not feel myself at liberty to depart from it. *Harris v. Ohio Insurance Company*, 5 Ohio Rep. 467.

It is further contended, that to make the defence available, the defendant must show that the plaintiff not only made a double insurance on the same goods, but that the plaintiffs were entitled to recover a ratable proportion of the loss from the subsequent underwriter. And this, he insists, is not the case here, for admitting, for the sake of argument, the policies are on the same goods, it is provided in the policy of the North America Company, "that it (the policy) shall not take effect, or be binding to the said corporation, in case the assured shall have already made, or shall hereafter make, any other assurance upon the property aforesaid, unless the same shall be allowed of and specified on the policy, in which case this company will bear ratably, and no more, of any loss from the perils hereby insured against which may happen to said property, in proportion to the several insurances then existing thereon." The defendants' defence rests on this, that the plaintiffs are doubly insured; but if the plaintiff could at no time have recourse to the North America Insurance Company, it cannot with any propriety be said that he was doubly insured. If the plaintiffs have failed to perfect their contract with the subsequent underwriters, by omitting to have the prior insurance allowed of and specified on the policy as is required, it is difficult to imagine in what way the prior insurance can be invalidated or affected. It is a vain, nugatory, void act. And this is the view taken of the question in *Jackson v. The Massachusetts Mutual Insurance Company*, 23 Pick. 423. An assurance to avoid the policy must be a valid and legal policy, and effectual and binding upon the assurers. It is not pretended the proviso in the North America Insurance Company has been complied with, but unless the prior policy is allowed of and specified on the policy, it is wholly inoperative and void, and of course, upon every principle of fair reasoning, it cannot avail the defendants, as a

defence, in this action. And thus the matter stands, without doubt, on the face of the policies; but the defendant insists that this doctrine, the force of which cannot be controverted, does not apply, because J. G. Stacey, who was examined as a witness for the plaintiff, in spite of an objection by the defendants, says that he had given Mr. Smith notice of the insurance at the Franklin Office, although he immediately adds, of other property insured at the Franklin Office. Taking all the testimony together, I cannot suppose that the witness intended to say that he told Mr. Smith he had insured the same goods at the Franklin Office, and that he mentioned this at the time with the view of having it indorsed on the latter policy. It is certain that Mr. Smith could not have so understood it; it would be difficult to imagine, if such was the fact, why the indemnity which is required was not made in conformity to the intimation. To make the policy valid, two things are required: 1st. It must be allowed of; and 2dly, it must be specified on the policy. It requires an act of the company, or its authorized agent, and it may admit of doubts whether a notice simply, without more, would enable the assured to recover. Give the testimony its utmost force, the existence of a prior policy was mentioned, but there was no request or intimation that he desired it should be noted on the subsequent policy. Doubtless, when the company, or its agent, consented to specify it on the policy, and omitted to do so, they would not be allowed to set off their own laches as a defence. But that does not appear to be the case here; such laches have not been proved as would enable the plaintiff to recover from the North America Insurance, on the ground that the agent of the company had omitted to do that which by law he was required to do. It must be remembered, that to defeat the action against the first underwriter, the defendant must give the plaintiff a right of action against the subsequent insurer. He must, in effect, show a double insurance, which it cannot be unless it gives the plaintiff a right of action for a proportion of his indemnity.

It is contended that this is not a double insurance for another reason, that is, that the latter insurance is on the specific goods brought by the "John Sergeant." The insurance in the Franklin Office is "upon merchandise generally, including liquors and

groceries contained in store No. 37 South Wharves, for account of whom it may concern; say merchandise without exception." In the North America Insurance Office it is "on coffee and other merchandise, without exception, either on board the "John Sergeant" in this port, or in the brick store No. 37 South Wharves, in the city of Philadelphia." We cannot but be struck with the total absence of precision in the language of both policies, and as the great object is to discover the intention of the parties, it would be unsafe to take the words in their literal sense. So without going into the question of whether parol testimony of what takes place at the time may be admitted to explain a policy of insurance, yet it may be safely said that the subject-matter of marine and fire insurance, and other mercantile contracts, makes it necessary to go out of the written instrument in order to interpret it, more frequently than in most other contracts.

Policies are to be construed largely, according to the intention of the parties, and for the indemnity of the assured and the advancement of trade. 1 Burr. 345; 2 Binn. 373. Facts and circumstances *dehors* the instrument may be proved, in order to discover the intention of the parties. We are therefore at liberty to advert to the first, that the Messrs. Staceys were commission merchants, and that the object of inserting in the first policy, "merchandise without exception," was to dispense with the restriction upon what was considered as hazardous risks, enumerated in the first, second, and third sections of the thirteenth article. The plaintiffs insured to the amount of \$10,000, a sum supposed to be sufficient to cover the ordinary risks to which their property and the property of their consignees [consignors?] would be exposed from fire. Under these circumstances the "John Sergeant" arrived in port, having on board coffee principally, and some other articles of comparatively small value, which it was thought prudent also to insure, and as it was uncertain whether the cargo would be suffered to remain on board, or whether it would be stored in whole or in part, it was insured as coffee either on board the "John Sergeant" or in the brick store No. 37 South Wharves. If this was all, it would, I think, be held to be a specific insurance on coffee to the amount of \$15,000, whether it remained altogether on board,

or was altogether or in part removed into the store. But such is the looseness of expression, that even this construction would be doing some violence to the language. The insurance is on coffee and other merchandise without exception, either on board the "John Sergeant" or in the store. What is the meaning of the words "and other merchandise without exception," connected with the other parts of the assurance? The defendants say that they apply to the subject matter of insurance, and that it is an insurance on coffee and other merchandise, whether on board vessel in the port or in store; whether imported in the ship or received in store from other sources. If this be so, it is on the same goods embraced in the Franklin Insurance, and the defendants are only entitled to their proportion of the loss, viz.: two fifths, that is, as \$10,000 is to \$25,000. The plaintiff insists that being sufficiently insured already to cover ordinary risk to the general business as commission merchants, the object of the second insurance was to effect a specific insurance on the coffee brought by the "John Sergeant," whether it remained on board or was stored. That the reason for inserting the words, "and merchandise without exception" (which were taken from the policy of the defendants themselves, where they were used for a similar purpose), was to prevent the policy being avoided by having on the premises what they would be likely to have in their business, certain goods enumerated in the policy as hazardous risks, or, in other words, they were desirous of having what has been denominated a clean policy. Although, it must be confessed, there is some doubt about it, yet we incline to adopt the latter construction. If, as is alleged, the first insurance was sufficient to cover all probable risks to which the goods usually in the store might be exposed from fire, it is difficult to imagine why an additional insurance to so large an amount should be effected, as it has not been intimated that any doubts were entertained of the entire solvency of the first underwriters. The fairness of the transaction has not been questioned. No fraud has been insinuated; and if, as is supposed, it was intended as a double insurance, it seems strange it should not have been indorsed on the last policy at least, as the Messrs. Staceys have, it is believed, ordinary intelligence, and must have been aware of the necessity of it to validate these contracts. And it is still more difficult to conjecture why

Mr. Smith did not indorse it on the latter policy, if he was informed, as the defendants say, that there was another policy on the same goods in the Franklin Office. He must have been aware that this was absolutely essential by express terms of the policy of the office, and that the omission to indorse it would endanger both policies. But all this is susceptible of easy explanation, if we suppose the first policy covered the goods generally in the store, and the second the specific goods imported in the "John Sergeant." He might well say he had given Mr. Smith notice of the insurance at the Franklin Office of other property, without intending to say, or having the least idea that the latter was an insurance on the same goods. And Mr. Smith must have so understood it, as otherwise, occupying the situation he did in the office, the indorsement would have been made; for we are not to suppose him so extremely negligent of his duty as to omit doing what was absolutely necessary to the validity of the contract, much less can we believe the omission was wilful, which would be a gross fraud. But it is said that upon the removal of the goods from the ship into the store, the policy of the Franklin Office immediately attached, so as to render them liable for their proportion of the loss of the goods which were imported in the "John Sergeant." But this is not so clear, for I see nothing to prevent assurers, after a general insurance, to effect a specific insurance on particular goods, on which alone another subsequent underwriter would be liable without contribution.

Under the views which have been taken of this cause, it is obviously unnecessary to perplex ourselves with a consideration of the numerous errors which have been assigned to the admission and rejection of testimony. This is a motion for a new trial, and if any error has been committed (of which I am not convinced), as it would not alter the result, no new trial will be ordered. This cause has been twice tried, and twice the verdict has been in favor of the plaintiffs; it is therefore time there should be an end to the controversy. The defendants should be compelled to do justice to the plaintiffs by paying them the amount of the insurance for which they have received a full premium.

Rule discharged, and judgment for the plaintiffs on the verdict.

JOHN CHARLES MASON vs. THE LOUISIANA STATE MARINE AND
FIRE INSURANCE COMPANY.¹

(Supreme Court, Louisiana, December Term, 1841.)

Pleading. — General Averments. — New Trial.

In an action on a policy of insurance, an allegation in the petition that the defendants were legally put in default, will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, when such compliance is proved on the trial. A new trial should never be granted when the ends of justice have been attained. The verdict of a jury will not be disturbed when it does not appear that the judge, from whom a new trial was asked, erred in refusing it.

Roselius, for the plaintiff.

C. M. Conrad, for the defendants.

MARTIN, J. The defendants are appellants from a judgment by which the plaintiff has recovered the value of goods insured in their office, and destroyed by fire. The answer admits the insurance, and that a portion of the goods insured was destroyed by fire. It denies all other allegations in the petition, and especially that the damage amounted to the sum claimed; it avers that the plaintiff has exaggerated his loss, with a view to defraud the defendants, and under a clause of the policy has forfeited his claim. The plaintiff had a verdict, which the defendants attempted to set aside, on the ground that it was contrary to law and evidence; and that the plaintiff offered no proof of compliance with the several conditions of the policy, particularly of the preliminary proofs of loss. The new trial was refused. Our attention is arrested by a bill of exceptions to the opinion of the first judge, sustaining the defendants' opposition to the production of a witness of a statement of the loss made by the plaintiff, who had called this witness. As the bill of exceptions was taken by the appellee, who has obtained a judgment of which he does not seek the amendment, it is useless to examine whether the judge erred, as the error, if there be any, wrought no injury to the plaintiff. The appellant's counsel has urged that the judge erred in overruling his objections to the verdict, on the ground that no proof of compliance with the several conditions of the policy was offered, and particularly of

¹ 1 Robinson, 192.

the preliminary proofs of loss. By a clause in the policy, article 7, it is provided, that "all persons assured by this company, sustaining any loss or damage by fire, are forthwith to give notice to this company, and, as soon as possible after, to deliver in as particular an account of their loss or damage, signed with their own hands, as the nature of the case will admit of, and make proof of the same by their oath or affirmation, and by their books of account or other proper vouchers, as shall be reasonably required; and shall procure a certificate under the hands of a magistrate, or some notary of the city or district in which the fire happened, not concerned in such loss, importing that he is acquainted with the character and circumstances of the person or persons insured, and knows or verily believes that he, she, or they really, and by misfortune, without any kind of fraud or evil practice, have sustained by such fire loss or damage to the amount therein mentioned; and until such affidavit and certificates are produced, the loss money shall not be payable; also, if there appears any fraud or false swearing, the claimant shall forfeit his claim to restitution or payment, by virtue of this policy."

The petition does not express a compliance in detail with the provisions of this clause, but alleges that the defendants were legally put in default. The record exhibits proof of the plaintiff having furnished the defendants with the statement of his loss required in the above article. The president of the company was called upon to produce, and actually brought into court, the statement of the loss, delivered to him by the plaintiff. This is the statement, to the truth of which the plaintiff sought the testimony of the witness, on the rejection of which a bill of exceptions was taken. It is, therefore, clear that the statement of the loss was delivered by the plaintiff. It is not alleged that it was delivered untimely, nor that any proof was required preliminarily. The statement is certainly a notice; the judge, therefore, did not err in refusing the new trial, on the alleged ground of the due notice and statement not having been given. It does not appear that the absence of the certificate was urged before the jury. The certificate was to state that the officer who grants it, knows the character and circumstances of the party, and knows or verily believes, that without any fraud or

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evil practice, he has sustained a loss to the amount claimed. The answer admits the loss of the plaintiff to a certain amount, but complains of its exaggerations only. The unqualified admission of the destruction of part of the goods insured, excludes the idea of a destruction by fraud or evil practice. The exaggeration was, therefore, the only matter in issue. On this part of the case, the certificate of the justice or notary would be of very little aid, for it suffices that he shall certify his belief. The jury was of opinion that there was no exaggeration. The first judge thought that there was not any, and we are unable to come to a different conclusion. A new trial ought never to be granted when the court is of opinion that the ends of justice have been attained; and this court will never disturb a verdict, when it does not appear to them that the judge, from whom a new trial was asked, did not err in refusing it. On the merits, the case is clearly with the plaintiff. *Judgment affirmed.*

JEREMIAH CARPENTER, plaintiff in error, vs. THE PROVIDENCE WASHINGTON INSURANCE COMPANY, defendants in error.¹

(Supreme Court, United States, January Term, 1842.)

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A fire insurance policy, insuring the interest of a mortgagor, in which permission is granted to assign the policy to A., who is in fact the mortgagee, though not so named, covers the interest of the mortgagor, and not that of the mortgagee; and such a policy therefore constitutes "other insurance by the insured on the property hereby insured," within the meaning of a provision concerning other insurance in a subsequent policy obtained by the mortgagor. Want of notice of such prior insurance will not be excused by reason of the fact that the prior policy was voidable by the insurer. And the notice must be in writing.

THE case is fully stated in the opinion.

Whipple, for the plaintiff.

Green & Sergeant, for the defendants.

STORY, J., delivered the opinion of the court.

This is a writ of error to the circuit court for the district of Rhode Island. The original action was brought by Carpenter

¹ 16 Peters, 495.

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the plaintiff in error, against the Providence Washington Insurance Company, the defendants in error, upon a policy of insurance underwritten by the insurance company of \$15,000, "on the Glenco Cotton Factory in the State of New York," owned by Carpenter, against loss or damage by fire. The policy was dated on the 27th of September, 1838, and was to endure for one year. Among other clauses in the policy are the following: "And provided further that in case the insured shall have already any other insurance on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect." "And if the said insured or his assigns shall hereafter make any other insurance on the same property, and shall not with all reasonable diligence give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect. And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the said property." "The interest of the insured in this policy is not assignable, unless by consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall henceforth be void and of no effect." Annexed to the policy are the proposals and conditions on which the policy is asserted to be made, and among them is the following: "Notice of all previous insurances upon property insured by this company shall be given to them, and indorsed on the policy, or otherwise acknowledged by the company in writing, at or before the time of their making insurance thereon, otherwise the policy made by this company shall be of no effect."

The declaration averred that during the continuance of the policy, he, Carpenter, was the owner of the property by the policy insured, and was interested in said property to the whole amount so insured by the company; and that on the 9th of April, 1839, the factory was totally destroyed by fire, of which

the company had due notice and proof. The cause came on for trial upon the general issue, and a verdict was found for the defendants. The plaintiff took a bill of exceptions to certain instructions refused, and other instructions given by the court in certain matters of law arising out of the facts in proof at the trial, and judgment having been given upon the verdict for the defendants, the present writ of error has been brought to ascertain the validity of these exceptions. The facts which were in proof at the trial were very complicated, but those which are material to the present inquiry will be, as briefly as they may be, here stated. The premises were originally owned in equal moieties by Egbert and Epenetus Reed. In June, 1835, Epenetus Reed conveyed his moiety to H. M. Wheeler, who gave a bond and mortgage on the premises to secure \$8,000 of the purchase money to Epenetus Reed. On the 17th of October 1836, Egbert Reed sold his moiety of the premises to Samuel G. Wheeler, and the latter thereupon gave a bond and mortgage for the sum of \$10,000 (the purchase money) to Epenetus Reed; and on the same day, he, Wheeler, made an additional agreement under seal with Epenetus Reed, by which he covenanted that he would effect a policy of insurance upon the property in the name of himself, or himself and Henry M. Wheeler, for the sum of at least \$10,000, and assign the same to him, Reed, as collateral security to the said last bond and mortgage, and would annually renew the policy or effect a new one, and keep each assigned to Reed as security, in such way and manner as that the said property shall be insured for at least the sum of \$10,000, and the policy held by him as collateral security as aforesaid; and if he neglected so to insure or assign for the space of ten days, then, that Reed might do the same at the expense of Wheeler, and add the premium which he might be compelled to pay with interest thereon to his said bond and mortgage, and to collect the same therewith, or that Wheeler would pay the same to him in such other way as he might desire.

From the 17th of October, 1836, to the 6th of December 1837, Henry M. Wheeler and Samuel G. Wheeler continued to own the factory in equal moieties, and transacted business under the firm of Henry M. Wheeler and Company. On that day

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Samuel G. Wheeler sold his moiety to Jeremiah Carpenter. On the 18th of April, 1838, Henry M. Wheeler sold and conveyed his moiety to Carpenter, who thus became the sole owner of the entire property. The last conveyance declared the property subject to a mortgage on the premises from Henry M. Wheeler and wife, dated in June, 1835, to Epenetus Reed, on which there was then due \$6,000, which Carpenter assumed to pay. There had been a prior policy on the premises in the Washington Insurance Office, which, upon Carpenter's becoming the sole owner, the company agreed to continue for account of Carpenter, and in case of loss, the amount to be paid to him. That policy expired on the 27th of September, 1838, the day on which the policy upon which the present suit is brought, was effected.

It is proper farther to state that other policies on the same factory had been effected and renewed from time to time, from December 12, 1836, for the benefit of the successive owners thereof, by another insurance company in Providence called the American Insurance Company; and among these was a policy effected by way of renewal, on the 14th of December, 1837, in the name of Henry M. Wheeler and Company, for \$6,000, for the benefit of Henry M. Wheeler and Carpenter (who were then the joint owners thereof), payable in case of loss to Epenetus Reed. The sale by Henry M. Wheeler to Carpenter, on the 18th of April, 1838, of his moiety having been notified to the American Insurance Company, the latter agreed to the assignment, and the policy thenceforth became a policy for Carpenter, payable in case of loss to Epenetus Reed. And on the 23d of May, 1838, Carpenter transferred all his interest in the policy to Epenetus Reed. The policy thus effected on the 14th of December, 1837, was (as the Washington Insurance Company assert) not notified to them at the time of effecting the policy made on the 27th of September following, and declared upon in the present suit; nor was the same ever mentioned in or indorsed upon the same policy; and upon this account the company insist that the present policy is, pursuant to the stipulations contained therein, utterly void.

Subsequently, namely, on the 11th of December, 1838, the American Insurance Company renewed the policy of 14th of December, 1837, for Carpenter, and at his request, for one year.

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This renewed policy was never notified to the Washington Insurance Company, nor acknowledged by them in writing; nor does it appear ever to have been actually assigned to Epenetus Reed, down to the period of the loss of the factory by fire. On this account, also, the Washington Insurance Company insist that their policy of the previous 27th of September, 1838, is, according to the stipulations therein contained, utterly void.

It seems to have been admitted, although not directly proved, that a suit was brought upon the policy of the 14th of December, 1837, at the American Insurance Office, after the loss, by Carpenter, as trustee of or for the benefit of Reed, for the amount of the \$6,000 insured thereby; and that at the November term, 1839, of the circuit court, the company set up as a defence, that there was a material misrepresentation of the cost and value of the property in the factory insured made to them, at the time of the original insurance; and it being intimated by the court that, if such was the fact, it would avoid the policy, the plaintiff acquiesced in the decision, and discontinued or withdrew the action before verdict.

The instructions prayed and refused, and also the instructions actually given by the court, are fully set forth in the record. It does not seem important to the opinion, which we are to pronounce, to recite them at large, in *totidem verbis*, since the points on which they turn admit of a simple and exact exposition.

The first instruction asked the court, in effect, to say that the original policy of the American Insurance Company, made in December, 1836, and the several renewals thereof, although made in the name of the Wheelers (the mortgagors), being in fact for the use and benefit of Epenetus Reed, the mortgagee, were for all substantial purposes the policy of Reed, and could never enure to the benefit of the Wheelers, or of Carpenter; and that neither the Wheelers nor Carpenter had any such interest therein as rendered it incumbent on them to give any notice of its existence to the Washington Insurance Company; and that it was, to all intents and purposes, as if Reed had effected the said policy in his own name upon his specific interest as mortgagee. This instruction the court refused to give; and, on the contrary, instructed the jury that, as by the memorandum made on that policy on the 14th of December, 1837, the policy was, by the

consent of all the parties interested therein, and of Carpenter, to be for the benefit of Carpenter, he, Carpenter, became interested therein legally or equitably ; and that, notwithstanding the assignment thereof by the Wheelers to Carpenter, and of Carpenter to Reed, the policy and the renewals thereof ought to have been notified to the Washington Insurance Company, at the time when the policy declared on was underwritten, if the policy was then a subsisting policy, and was so treated by Carpenter and the American Insurance Company, and Carpenter had a legal or equitable interest therein, and was entitled to the benefit thereof.

The question, then, is here broadly presented, whether the policy of the American Insurance Company is, under all the circumstances, to be treated as a policy exclusively for Reed, the mortgagee, or whether it is to be treated as a policy on the property of, and for the benefit of, the mortgagors. No doubt can exist that the mortgagor and the mortgagee may each separately insure his own distinct interest in the property. But there is this important distinction between the cases: that where the mortgagee insures solely on his own account, it is but an insurance of his debt ; and if his debt is afterwards paid or extinguished, the policy ceases from that time to have any operation, and even if the premises insured are subsequently destroyed by fire, he has no right to recover for the loss, for he sustains no damage thereby ; neither can the mortgagor take advantage of the policy, for he has no interest whatsoever therein. On the other hand, if the premises are destroyed by fire before any payment or extinguishment of the mortgage, the underwriters are bound to pay the amount of the debt to the mortgagee, if it does not exceed the insurance. But, then, upon such payment, the underwriters are entitled to an assignment of the debt from the mortgagee, and may recover the same amount from the mortgagor, either at law or in equity, according to circumstances ; for the payment of the insurance by the underwriters does not, in such a case, discharge the mortgagor from the debt, but only changes the creditor.

Far different is the case where an insurance is made by the mortgagor on the premises on his own account ; for notwithstanding any mortgage or other incumbrance upon the premises,

he will be entitled to recover the full amount of his loss, not exceeding the insurance, since the whole loss is his own, and he remains personally liable to the mortgagee or other incumbrancer for the full amount of the debt or incumbrance.

These principles we take to be unquestionable, and the necessary result of the doctrines of law applicable to insurances by the mortgagor and the mortgagee. If, then, a mortgagor procures a policy on the property against fire, and he afterwards assigns the policy to the mortgagee with the consent of the underwriters (if that is required by the contract to give it validity), as collateral security, that assignment operates solely as an equitable transfer of the policy, so as to enable the mortgagee to recover the amount due in case of loss; but it does not displace the interest of the mortgagor in the premises insured. On the contrary, the insurance is still his insurance, and on his property and for his account. And so essential is this, that if the mortgagor should transfer the property to a third person, without the consent of the underwriters, so as to divest all his interest therein, and then a loss should occur, no recovery can be had therefor against the underwriters, because the assured has ceased to have any interest therein, and the purchaser has no right or interest in the policy. Another essential difference between the case of a mortgagor and that of a mortgagee (which has been already hinted at) is, that the latter can insure for himself at most, only to the extent of his debt, whereas the mortgagor can insure to the full value of the property, notwithstanding any incumbrances thereon, for the reasons already stated.

Some of these principles are completely illustrated by the terms of this very policy of the American Insurance Company, and the like clauses are to be found in the policies of the Washington Insurance Company, now under consideration. Thus, although it is expressly provided, "that the assured may assign this policy to Epenetus Reed," yet, it is at the same time provided, that "the interest of the assured in this policy is not assignable unless by the consent of this corporation, manifested in writing; and in case of any transfer or termination of the interest of the insured, either by sale or otherwise, without such consent, this policy shall, from thenceforth, be void and of no

effect." Now, the interest here last spoken of, manifestly, is the interest of the owner in the premises insured, and not merely his interest in the policy.

But, independently of any special clauses of this sort, it is clear, both upon principle and authority, that an assignment of a policy by the insured only covers such interest in the premises as he may have at the time of the insurance, and at the time of the loss. It is the property of the insured, and his alone, that is designed to be covered; and when he parts with his title to the property, he can sustain no future loss or damage by fire, but the loss, if any, must be that of his grantee. The rights of the assignee cannot be more extensive under the policy than the rights of the assignor; and, as the grantee of the property, he can take nothing by the grant in the policy, since it is not in any just or legal sense attached to the property, or any incident thereto. This doctrine was laid down in very expressive terms by Lord Chancellor King, so long ago as in the case of *Lynch v. Dalzell*, 4 Bro. Parl. Rep. 431, edit. Tomlins; 2 Marsh. Insur. b. 4, c. 4, 803, which was an insurance against fire. "These policies," said he, "are not insurances of the specific things mentioned to be insured, nor do such insurances attach on the realty, or in any manner go with the same as an incident thereto by any conveyance or assignment, but they are only special agreements with the persons insuring against such loss or damage as they may sustain. The party insured must have a property at the time of the loss, or he can sustain no loss, and consequently can be entitled to no satisfaction." "These policies are not in their nature assignable, nor is the interest in them ever intended to be transferable from one to another, without the express consent of the office." Now this case is the stronger, because it was a case where not only the policy, but the premises, had been assigned to the very parties who sought the benefit of the insurance. The same doctrine was asserted by Lord Hardwicke, in the case of *The Sadlers' Company v. Badcock*, 2 Atk. 554, where there had been an assignment of the policy after the insured ceased to have any interest in the premises. Upon that occasion Lord Hardwicke said: "I am of opinion [that] the assured should have an interest or property at the time of the insuring, and at the time the fire

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happens." "The society are to make satisfaction in case of any loss by fire. To whom or for what loss are they to make satisfaction? Why, to the person insured, and for the loss he may have sustained; for it cannot properly be called insuring the thing, for there is no possibility of doing it, and therefore must mean insuring the person from damage;" and he cited with approbation the very language of Lord King, already stated, in *Lynch v. Dalzell*. The authority of these cases was fully recognized and acted upon by this court in the case of *The Columbia Insurance Company of Alexandria v. Lawrence*, 10 Pet. 507, 512, where the court said: "We know of no principle of law or of equity, by which a mortgagee has a right to claim the benefit of a policy underwritten for the mortgagor, on the mortgaged premises, in case of a loss by fire. It is not attached or an incident to his mortgage. It is strictly a personal contract for the benefit of the mortgagor, to which the mortgagee has no more title than any other creditor."

For these reasons it is apparent that Epenetus Reed, as mortgagee, and merely in that character, can have no interest in or right to the policy in the American Office, now under consideration. The insurance is not made by him, or in his name, or upon his account. The policy was originally made in December, 1836, for Henry M. Wheeler & Company, who were then the owners of the factory, and by its very terms it is an insurance for them against loss or damage by fire. When the policy was renewed in December, 1837, it was so renewed for the benefit of Henry M. Wheeler and Jeremiah Carpenter, who had then become the joint owners thereof. When, subsequently, in April, 1838, Carpenter became the sole owner of the premises, the company agreed to the transfer and assignment of the entirety to Carpenter, so that henceforth it became a policy upon his sole property, for his account and benefit, in the same manner, and with the same legal effect, as if the policy had been renewed in his own name.

But it is said that there is a clause in the original policy, and it is equally applicable to the renewals, "that the assured may assign this policy to Epenetus Reed." And the argument is, that this liberty to assign, where the assignment to Reed was actually executed, transferred the whole interest in the property

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insured, as well as in the policy, to Reed, and made the policy to all intents and purposes a policy for the sole benefit of Reed as mortgagee, as much as if the insurance had been made in his own name.

To this suggestion several answers may be made, each of which is equally fatal to the construction contended for. In the first place, although an assignment to Reed was authorized by the policy, it was never disclosed to the American Insurance Company for what purposes or objects the assignment was to be made; whether to Reed as trustee, or agent of the insured, or for fugitive and temporary purposes, or as a security for debts, or whether it was designed to be absolute and unconditional. Neither was it disclosed to the company that Reed was in point of fact a mortgagee; nor were the company requested to insure his interest as mortgagee, or to make the insurance exclusively upon his interest and for his account. Now, as has been already seen, an insurance for a mortgagor, and one for a mortgagee, involve very different considerations, responsibilities, rights, and duties, and the company might well be willing to make an insurance upon the property on account of the mortgagors, when they might be unwilling to make any on account of the mortgagee. And it is clear, upon principle, that no policy can or ought to be deemed a policy exclusively upon the interest of the mortgagee, unless the company have notice that it is so designed, and they assent to it. A mortgage interest is without doubt an insurable interest, but then it is a special interest, and should be made known to the underwriters. Mr. Marshall, in his *Treatise on Insurance against fire*, says: "It is not necessary, however, in all cases, in order to constitute an insurable interest, that the insured shall in every instance have the absolute and unqualified property of the effects insured. A trustee, a mortgagee, a reversioner, a factor, an agent with the custody of goods to be sold upon commission, may insure, but with this caution, that the nature of the property be distinctly specified." 2 Marsh. Insur. b. 4, c. 2, p. 789. This language was quoted with approbation by this court in the case of *The Columbia Insurance Company v. Lawrence*, 2 Pet. 25, 49, and the reason for it is there given by the court. "Generally speaking," said the court, "insurances against fire are made in

the confidence that the assured will use all precautions to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principles as on the interest of the assured, and it would seem, therefore, to be always material that they should know how far this interest is engaged in guarding the property from loss." Now, since there is no pretence to say, that the interest of Reed as mortgagee was disclosed to the company, or that the company agreed to insure his interest as mortgagee, and that only, it would seem to follow that the policy cannot be construed to operate in the manner propounded by the instruction prayed by the plaintiff.

In the next place, the policy itself, upon its very terms, admits of no such interpretation to give due effect to those terms. The policy, as has been already stated, is in the name of the owners, and for their account, and on their property. If it was designed solely for Reed, why was he not named, and he alone named as the insured? How can any court be at liberty, without other explanatory words, to construe a policy made by A., in his own name, on his property, to be, not a policy on his own interest, but on the interest of B., who is a stranger to the policy? The language of Lord King, and Lord Hardwicke, and of this court, in the cases already cited, show conclusively that policies of this sort are not deemed in their nature incidents to the property insured, but that they are mere special agreements with the persons insuring against such loss or damage as they may sustain, and not the loss or damage that any other person having an interest as grantee, or mortgagee, or creditor, or otherwise, may sustain by reason of a subsequent destruction thereof by fire. It would seem, then, repugnant to the terms of this policy to construe it to be not what it purports to be, an insurance for the owner of the property, but an insurance for an undisclosed creditor or mortgagee. It would materially change the language, the objects, and the obligations of the parties thereto.

In the next place, it would, in our judgment, be inconsistent with the manifest intention, as well of the insured as of Reed,

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to give it such an interpretation. The agreement between Samuel G. Wheeler and Reed, of the 17th of October, 1836, demonstrates, in the clearest manner, that the policy was to be effected by the Wheelers, as owners, and to be assigned after it was effected by them to Reed, as collateral security for his bond and mortgage; and it was only upon their neglect to procure such insurance and assign the policy, that Reed was to be at liberty to do the same at their expense. The language of the instrument is: "I do hereby agree with Epenetus Reed, &c., that I will effect a policy of insurance upon the said property in the name of myself, or of myself and Henry M. Wheeler, for the sum of at least \$10,000, and assign the same to him as collateral security to said bond and mortgage; and that I will annually renew the said policy, or effect a new one, and keep each assigned to him as security, &c., and the policy held by him as collateral security; and if I neglect so to insure and assign for the space of ten days, then that said Reed may do the same at my expense," &c. Now, language more direct than this can scarcely be imagined to express the intentions of the parties, that the insurance was to be made in the name of the owners, upon their interest in the property, and for their account, and the policy to be assigned as collateral security to Reed. Not one word is said that the insurance was to be solely and exclusively for Reed, as mortgagee; for in such a case he would hold the policy as a principal and not as a collateral security. It is obvious from the language, also, that Reed was not to be the absolute owner of the policy, as he would be if made for him exclusively as mortgagee, but he was to hold it as collateral security. If, then, the debt of Reed should be paid or extinguished in the whole or in part, would not the right of the owners correspondently attach to the policy? If the whole debt was paid, would they not be entitled to a reassignment thereof? Yet, unless in such a case the policy attached to the property for their own account and benefit, the reassignment would be a mere nullity. To us it seems beyond all reasonable doubt that the policy under this agreement was designed by the parties to be on account of the owners and for their benefit, and that it was to be only collateral security to Reed to the extent of any interest he might have therein in case

of loss by fire. In this view it operated as a security to the owners against the entire loss. In any other view they would only change their creditors upon any loss from Reed to the underwriters.

Besides, in point of fact, the policy must have its effect and operation from the time of its execution, and not otherwise. The language of the policy is, "that the assured may assign this policy to Epenetus Reed," not that this policy shall now be for Epenetus Reed or in his interest. The owners, then, had an option whether to assign or not. If they never had assigned the policy to Reed at all, and a loss had occurred, would not the loss have been payable to the owners? In point of fact, the policy, although made on the 12th of December, 1836, was not assigned to Reed until the 21st of January, 1837. In whom did the interest then originally, and in the intermediate time, vest, under the policy? Clearly in the owners, for they and they only had any interest in the property or the policy until the assignment was made. The authorities all hold that the party insured must have an interest at the time of the making of the policy, as well as at the time of the loss; and if Reed had no interest, upon which the policy would attach by its terms when the insurance was made, but acquired it afterwards, and the policy had been made upon his sole account, it would have been a mere nullity. The subsequent renewals were to the same effect, and for the same purposes and parties as the original policy. Carpenter, after he became sole owner, did not assign the policy to Reed until the 23d of May, 1838, more than five months after the renewals, and more than one month after the conveyance of the whole property to himself. Now, the question may be here again asked, whether, if the loss had occurred before these assignments, a recovery upon the policy might not have been had by Carpenter, in his own name, and for his own account? We think that the question must be answered in the affirmative; and if so, then it demonstrates that the policy made in the name of the owners was for their account and benefit; and payment was, in case of loss, to be made to Reed.

For these reasons we are of opinion that the first instruction asked of the court was rightly refused, and that the instruction given was entirely correct.

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The second instruction asked proceeds upon the ground that, although the policy of the American Insurance Company, of the 6th of December, 1836, was good upon its face, yet if, in point of fact, it was procured by a material misrepresentation by the owners of the cost and value of the premises insured, it was to be deemed utterly null and void, and therefore as a null and void policy, notice thereof need not have been given to the Washington Insurance Company at the time of underwriting the policy declared on. The court refused to give the instruction; and, on the contrary, instructed the jury that if the policy of the American Insurance Company was, at the time when that at the Washington Insurance Office was made, treated by all the parties thereto as a subsisting and valid policy, and had never, in fact, been avoided, but was still held by the assured as valid, then that notice thereof ought to have been given to the Washington Insurance Company, and if it was not, the policy declared on was void.

We are of opinion that the instruction, as asked, was properly refused, and that given was correct. It is not true, that because a policy is procured by misrepresentation of material facts, it is therefore to be treated, in the sense of the law, as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon due proof of the facts; but until so avoided, it must be treated, for all practical purposes, as a subsisting policy. In this very case the policy has never, to this very day, been avoided, or surrendered to the company. It is held by the assured; and he may, if he pleases, bring an action thereon to-morrow; and unless the underwriters should at the trial prove the misrepresentation, he will be entitled to recover. But the question is not, how the policy may now be treated by the parties, but how was it treated by them at the time when the policy declared on was made? It was then a subsisting policy, treated by all parties as valid, and supposed by the underwriters to be so. The misrepresentation does not then seem to have been known to the American Insurance Company. It was an extrinsic fact; and if known to the American Insurance Company, it certainly was not known to the Washington Insurance Company. How were the latter to arrive at any knowledge of the facts of misrepresentation; and how were they to

avail themselves of the fact, if the American Insurance Company should not choose to insist upon it? Nor is it immaterial in the present case, as was suggested at the bar, that the present plaintiff now seeks to avail himself of his own misrepresentation, or that of those under whom he claims, to protect himself against his own laches in not giving notice of the policy to the underwriters. And it may well be doubted whether a party to a policy can be allowed to set up his own misrepresentations to avoid the obligations deducible from his own contract. Be this as it may, it is, in our judgment, free from all reasonable doubt, that notice of a voidable policy must be given to the underwriters; for such a case falls within the words and meaning of the stipulations in the policy. It is a prior policy, and it has a legal existence until avoided.

Indeed, we are not prepared to say that the court might not have gone further, and have held that a policy—existing and in the hands of the insured, and not utterly void upon its very face, without any reference whatever to any extrinsic facts—should have been notified to the underwriters, even although by proofs, afforded by such extrinsic facts, it might be held in its very origin and concoction a nullity. And this leads us to say a few words upon the nature and importance and sound policy of the clauses in fire policies, respecting notice of prior and subsequent policies. They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest of the insured in the premises insured, as will guarantee on his part vigilance, care, and strenuous exertions to preserve the property. To quote the language of this court in the passage already cited, the underwriters do not rely so much upon the principles as upon the interest of the assured. Besides, in these policies there is an express provision that in cases of any prior or subsequent insurances, the underwriters are to be liable only for a ratable proportion of the loss or damage as the amount insured by them bears to the whole amount insured thereon. So that it constitutes a very important ingredient in ascertaining the amount which they are liable to contribute

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towards any loss; and whether there be any other insurance or not upon the property is a fact perfectly known to the insured, and not easily or ordinarily within the means of knowledge of the underwriters. The public, too, have an interest in maintaining the validity of these clauses, and giving them full effect and operation. They have a tendency to keep premiums down to the lowest rates, and to uphold institutions of this sort, so essential in the present state of our country for the protection of the vast interests embarked in manufactures, and on consignments of goods in warehouses. If these clauses are to be construed with a close and scrutinizing jealousy, when they may be complied with in all cases by ordinary good faith and ordinary diligence on the part of the insured, the effect will be to discourage the establishment of fire insurance companies, or to restrict their operations to cases where the parties and premises are within the personal observation and knowledge of the underwriters. Such a course would necessarily have a tendency to enhance premiums, and to make it difficult to obtain insurances where the parties live, or the property is situate, at a distance from the place where the insurance is sought.

But, be these considerations as they may, we see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract, which, upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for these stipulations, would not have been entered into. We are, then, of opinion that there is no error in the second instruction. On the contrary, there is strong ground to contend that the stipulations in the policy as to notice of any prior and subsequent policies, were designed to apply to all cases of policies then existing in point of fact, without any inquiry into their original validity and effect, or whether they might be void or voidable.

We have not thought it necessary upon this occasion to go into an examination of the cases cited from the New York and

Massachusetts Reports, either upon this last point, or upon the former point. The decisions in those cases are certainly open to some of the grave doubts and difficulties suggested at the bar, as to their true bearing and results. The circumstances, however, attending them, are distinguishable from those of the case now before us, and they certainly cannot be admitted to govern it. The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of state tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned state courts, we may regret it, but it cannot be permitted to alter our judgment.

The third instruction prayed the court to instruct the jury that if the Washington Insurance Company had notice, in fact, of the existence of the policy in the American Office, that "was in law a compliance with the terms of the policy." The court refused to give the instruction as prayed, but instructed the jury that at law, whatever might be the case in equity, mere parol notice of such insurance was not, of itself, sufficient to comply with the requirements of the policy declared on; but that it was necessary, in case of any such prior policy, that the same should not only be notified to the company, but should be mentioned in or indorsed upon the policy; otherwise the insurance was to be void and of no effect. We think this instruction was perfectly correct. It merely expresses the very language and sense of the stipulation of the policy; and it can never be properly said that the stipulation in the policy is complied with, when there has been no such mention or indorsement as it positively requires, and without which it declares the policy shall henceforth be void and of no effect.

The fourth and last instruction given by the court, stands upon the same considerations as those already mentioned; and

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it would be a useless task to repeat them. If the other instructions given by the court were correct, it is admitted that this cannot be deemed erroneous.

Upon the whole, our opinion is that the judgment of the circuit court ought to be affirmed with costs.

This case has been much criticised upon the point of the necessity of giving notice of the prior insurance, especially in Massachusetts. See *Clark v. New England Mut. Fire Ins. Co.* 6 Cush. 342 (1850). The doctrine of the latter case is, that if the policy of which notice was not given was based upon a material misrepresentation, notice was unnecessary. The court speak of a misrepresentation which was of the essence of the contract, and their language clearly implies that if such was not the character of the misrepresentation, the policy is not void, and notice of it must be given. If this means that the minds of the parties must meet before a contract can arise, and that the fact misrepresented must be so important that there could have been no union of minds in the assumed contract, in order to excuse notice of the policy, the proposition is perfectly intelligible. Where the policy has never attached, there can be no need, in reason, of giving notice of the lifeless paper.

In this aspect the case is much as if a condition precedent to the existence of the contract had not been performed. But supposing the contract has once gone into effect, and that the ground for excuse of notice is the breach of a condition subsequent, as the non-payment of the second or third premium; how will this affect the case? The usual stipulation in such cases is, that the policy shall become null and void by the failure to pay the premium when due; and yet it has often been decided that such a condition is waived by a subsequent receipt of the money, or by suing on a premium note. *Bouton v. American Mutual Life Ins. Co.* 25 Conn. 542; *S. C.* 1 Life & Ac. Ins. R. 51 (1857); *Miller v. Brooklyn Life Ins. Co.* 2 Life & Ac. Ins. R. 35; *S. C.* affirmed, *Id.* 693; 13 Wall. (1871); *Mutual Benefit Life Ins.*

Co. v. Jarvis, 22 Conn. 133; *S. C.* 1 Life & Ac. Ins. R. 5 (1852); *Insurance Co. v. Stockbower*, 26 Penn. St. 199 (1856); *Wing v. Harvey*, 5 De G., M. & G. 265; *S. C.* 2 Life & Ac. Ins. R. 365 (1854). See also *Smith v. Saratoga Ins. Co.* ante, p. 97, note.

It results from these cases, if they are strictly accurate in holding that the policy is revived by the action of the company, that the term "void" means "voidable;" and in these cases it would seem necessary that notice of such other insurance should be given. See also *Atlantic Ins. Co. v. Goodall*, 35 N. H. 328 (1857); *David v. Hartford Fire Ins. Co.* 13 Iowa, 69 (1862). But whether this is true in any particular case or not must be determined largely by the language of the contract. It is clear that the policy could be so worded as to become absolutely void, beyond the power of ratification, upon the happening of a future event or condition, so that notice of it would not be essential. This, however, is believed to be unusual.

Upon the general question of notice of other insurance see *Mitchell v. Lycoming Mut. Ins. Co.* 51 Penn. St. 402 (1865); *Stacey v. Franklin Ins. Co.* 2 Watts & S. 506, ante, p. 108; *Jackson v. Massachusetts Mut. Fire Ins. Co.* 23 Pick. 418 (1839); *Clark v. New England Mut. Fire Ins. Co.* 6 Cush. 342, supra; *Jackson v. Farmers' Mut. Fire Ins. Co.* 5 Gray, 52 (1855); *Hardy v. Union Mut. Fire Ins. Co.* 4 Allen, 217 (1862); *Schenck v. Mercer County Mut. Ins. Co.* 4 Zab. 447 (1854); *Philbrook v. New England Mut. Ins. Co.* 37 Maine, 137 (1853); *Bigler v. New York Central Ins. Co.* 20 Barb. 635; *S. C.* affirmed, 22 N. Y. 402 (1860); *Gale v. Belknap Ins. Co.* 41 N. H. 170 (1860); *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520 (1863).

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BERNARD RAFFERTY vs. THE NEW BRUNSWICK INSURANCE COMPANY.¹

(Supreme Court, New Jersey, February Term, 1842.)

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It is not a violation of a policy of insurance that a house insured as a dwelling-house was afterwards occupied as a boarding-house, if keeping a boarding-house is not in the enumeration of things forbidden.

The keeping of spirituous liquors in the building insured for purposes of consumption, or for sale by retail to boarders and others, is not a *storing* within the meaning of the policy.

The retailing spiritous liquors without license does not constitute the occupant a *tavern-keeper* within the meaning of the policy.

WHITEHEAD, J. On the trial of this cause at the Essex circuit, the plaintiff gave in evidence the policy of insurance, affidavits of the extent of the loss, certificate of magistrate, &c. He also proved the time when the fire took place, and the extent of the loss as estimated by mechanics.

The defendants, on their part, proved by their agent that he was called upon by the plaintiff to make a survey of the house. That it was represented by the plaintiff to be a private dwelling-house. That at the time the insurance was effected it was not kept as a boarding-house, and he saw no bar in it. They also proved by a number of witnesses, that at the time of the fire and before it was in the possession of a woman, a tenant of the plaintiff, who kept it as a boarding-house, had a regular bar where liquor was sold by retail to the boarders and others who called. That all kinds of spirituous liquors were kept in open view in decanters, demijohns, and kegs, and that it was a place of common resort for the neighborhood.

The building was insured as a dwelling-house, and the policy contains the following clause: "And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned building shall at any time after the making and during the time this policy would otherwise continue in force, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business,

¹ 3 Harrison, 480.

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or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the proposals annexed to this policy, or for the purpose of *storing* therein any of the articles, goods, or merchandise, in the same proposals denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this corporation in writing, to be added or indorsed upon this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect."

Spirituous liquor is classed in the proposals annexed to the policy as an article denominated hazardous, as is also the business or trade of tavern-keeper.

The judge charged the jury upon the questions raised at the circuit, and afterwards discussed in the argument of the rule for new trial: that the keeping of a boarding-house by the tenant was not a violation of the policy; that the mere keeping of spirituous liquors in decanters, or demijohns and kegs, for the use of the family and to sell to the boarders, was not a *storing* of liquors within the meaning of the policy. Whether the woman kept a *tavern*, contrary to the provisions of the policy, or not, was submitted as a question for the consideration of the jury. Upon this part of the case the judge charged the jury as follows: "A person may keep tavern without a license. There is no penalty for keeping a tavern or inn without a license, but there is a penalty for a tavern-keeper or inn-keeper, or any other person, selling liquor without a license. If, therefore, a man or woman sets up or opens a house of entertainment for travellers or others, and furnishes them with meat, drink, and lodging, for pay and emolument, it is an inn or tavern to all intents and purposes; and if, under the evidence of this cause, you think that the tenant kept a tavern in the sense I have mentioned, then you ought to find for the defendants. It has not been insisted that a license is necessary to constitute a tavern within the meaning of the policy, nor do I think it can reasonably be contended for."

The plaintiff having obtained a verdict, the defendants seek to set it aside as being against law and evidence.

First. It is said the policy ought to be avoided because the

house was insured as a dwelling-house, and the plaintiff permitted it to be occupied as a boarding-house, and that the judge erred in his charge to the jury in this respect. To determine this we must ascertain whether the change from a dwelling-house, or a private dwelling-house, as was insisted on in the argument, to a boarding-house, was a violation of any prohibition contained in the contract between the parties.

The keeping of boarding-houses is not prohibited by the policy in express terms. There is no reference to them in the trades or business denominated hazardous or extra hazardous. And if the company have not seen fit to classify them as exposed to greater risk than ordinary dwelling-houses, they cannot, with any show of propriety, ask to avoid the policy on this ground.

The true rule, I apprehend, was laid down by Oakley, J., in *Langdon v. The New York Equitable Insurance Company*, 1 Hall, 226: "Where the insurance is general on the building, or where a store, in general terms, is insured, the true construction of the policy undoubtedly is, that all kinds of business may be carried on, and all kinds of goods and merchandise kept in the building, except such as are expressly prohibited." This case was removed by writ of error to the supreme court of the state of New York, the judgment affirmed, and is reported in 6 Wend. 623. The supreme court held, in reference to the same question, that "the enumeration of certain trades or kinds of business, as prohibited on the ground of being hazardous, is an admission that all other kinds are lawful under the contract."

In *Doe ex dem. Pitt v. Laming*, 4 Campbell, 76, the court ruled that a coffee-house was not an inn within the meaning of a policy of insurance against fire, enumerating the trade of an inn keeper, with others, as extra hazardous, and not covered by the policy.

As the plaintiff, in this case, was not prohibited by his contract with the defendants from keeping a boarding-house, I am of opinion that the charge of the judge, in this respect, was correct.

Second. It is said the policy should be avoided because the premises were used for storing spirituous liquors, and that

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herein was also error on the part of the judge in his charge to the jury.

Was the keeping of the liquors in the house, as proved on the trial, a storing therein prohibited by the policy? I think not. The liquors kept by this tenant were for the consumption of her family, or to be sold to the boarders or others. No part of the house was used as a warehouse, wherein spirituous liquors or any other articles were deposited for safe keeping and redelivery in specie. It does not appear that any larger quantities were kept than she may have considered her business required, and, from the evidence, it is not probable that the whole stock of liquor which she had in decanters, demijohns, and kegs, at any one time, was as much as many private gentlemen have in their cellars for their own use. To adjudge the keeping of the spirituous liquors, under the circumstances of this case, to be a storing of them, in violation of the policy, would be a perversion of the term. It is difficult to define precisely the meaning of the word storing, as used by these parties. I have examined, with some care, the books within my reach to ascertain the adjudged meaning of the term, and can find but one authority upon the subject. The case before referred to, in 6 Wendell, 623, was upon a policy of insurance containing substantially, and almost literally, the same provision against storing in the building insured any of the articles denominated hazardous or extra hazardous, as is contained in this policy. The insurance in that case was upon "a three story brick building, with slate roof, situate at the corner of two streets." When the fire happened the building was occupied as a grocery store, and the tenant had in the cellar one cask of oil, one barrel of rum, one cask of Jamaica spirits, one pipe of gin, and some molasses. The tenant retailed his goods from the store, and kept a part of his stock there for that purpose, and replenished his stock from that in the cellar, as occasion required. The court not only decided that a grocery, not being prohibited, might be kept in the building, but that the keeping of oil and spirituous liquors in the store, under the circumstances disclosed in the case, was not appropriating or using the building for the purpose of storing those articles, within the meaning of the policy. They define the term stor-

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ing, as used by the parties in this case, "a keeping for safe custody, to be delivered out in the same condition substantially as when received," and say it only applies when the storing or safe keeping is the sole or principal object of the deposit, and not when it is merely incidental, and the keeping is only for the purpose of consumption.

Third. It is alleged that the tenant kept a tavern contrary to the express conditions of the policy, and that, therefore, no recovery can be had.

If we lay out of view the business of retailing liquors, pursued by the tenant at the time of the fire, and before, there was nothing in her occupation that constituted her a tavern-keeper in point of law, or in the general acceptance of the term. And surely, the simple fact of a person selling spirituous liquors by small measure will not constitute him a tavern-keeper. We were referred by counsel to Webster's dictionary for the definition of the word "*tavern*." He defines it "a house licensed to sell liquor to be drank on the spot. In some of the United States *tavern* is synonymous with *inn*, or hotel, and denotes a house for the entertainment of travellers, as well as for the sale of liquors, *licensed* for that purpose." It is not pretended that the tenant was in this sense of the term a tavern-keeper, not having received license for that purpose, nor did she hold herself out as such, nor did she entertain the travelling community. Aside from the unlawful business of selling liquor by small measure, it was no more than an ordinary boarding-house, which she was clearly entitled to keep. The mere fact of selling liquors by retail, at a *regular bar* in the house, to the boarders and others, although unlawful, will not vitiate the policy any more than the transaction of any other unlawful business upon the premises not prohibited by the policy. Whenever it is made to appear that the fire was occasioned by such unlawful use of the premises, the policy is destroyed. Did insurance companies design to prohibit the sale, by retail or otherwise, of spirituous liquors upon premises insured by them, they should make it a part of their contract, so that the insured and the community generally would understand their rights and duties and the obligations of the companies. In the language of the judge, in his charge to the jury in this case, "It is of great im-

portance to the community that these contracts of insurance against loss by fire should be well understood, and be faithfully carried into execution by the parties. On the one hand, the insurers ought not to be excused from payments on frivolous objections, or merely doubtful grounds; and on the other, the insured ought not to be allowed to recover, if he has violated the conditions of his policy." It was contended by the counsel for the defendants on the argument that as the building was insured as a dwelling-house, and represented by the plaintiff to defendants' agent to be a *private* dwelling-house, that there was a warranty on his part that it should not be occupied for the purposes proven at the trial; and that in suffering it to be occupied for those purposes, there was a breach of the warranty, or a misrepresentation in a material matter; and in either case the policy was avoided. If I am right in the view I have taken of the case, there has been no breach of warranty, or misrepresentation by the plaintiff, as there could be neither in the sense contended for by the counsel, without violating some stipulation or condition contained in the contract between the parties; and as there has been, in my opinion, no such violation, it follows that there has been no such breach of warranty, or misrepresentation.

I see no reason to disturb the verdict, and am of opinion that the rule to show cause should be discharged.

HORNBLOWER, C. J., and NEVINS, J., concurred; ELMER, J., absent.

WHITE, J. This is an action brought by Rafferty against the Fire Insurance Company, on a policy of insurance made on a house in which is stated in the pleadings.

The plaintiff, at the trial, after giving in evidence the policy of insurance, and also the proofs of loss of the house by fire, during the continuance of the policy, and the usual proof of notice and affidavit of the estimated extent of loss, and the magistrate's certificate, as required by the policy, and having proved by witnesses the amount of loss and the origin of the fire, rested his case.

The company then proved by their agent that at the solicitation of plaintiff he made a survey of the house insured. It was insured as a *dwelling-house*. That in taking that survey,

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he saw no bar when the policy was made, and did not understand that it was a boarding-house; that plaintiff said it was a *private dwelling-house*. He went into the back room, and saw no bar there.

And, by another witness, defendants proved that at the time of the fire (which was on the 5th of April, 1837) the house was occupied by a woman by the name of Milchy, as a kind of private house, where she sold liquor, and that at times persons were there drinking, and a good deal of drunkenness going on late at nights. It was a boarding-house for mechanics; that it had been kept as a boarding-house, and there was a counter in the back room, on the first floor, where there were all kinds of liquor in decanters. And it was in evidence that there was a regular bar, liquor sold to those who wanted, and there was some intoxication there.

By the policy, the company promise to pay the loss within sixty days after due proof of loss, &c.

And it is stipulated, agreed, and declared that if the house insured shall at any time during the policy, be appropriated to, applied or used for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated *hazardous* or *extra hazardous*, or specified in the memorandum of special rates in the proposals annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandise denominated hazardous or extra hazardous, or included in the memorandum of special rates; so long as the house is so used or occupied, the policy to cease and be of no force. And the memorandum attached to the policy, and referred to therein, designated as hazardous articles, among others, *spirituous liquors*, saltpetre, tar, oil, turpentine; and amongst the trades or occupations denominated hazardous, sail-makers, ship chandlers, and *tavern keepers*.

And it is submitted to the court, on this application, whether on the evidence the plaintiff was entitled to a verdict, or whether the policy had been forfeited by the plaintiff, in consequence of the mode and manner the said house was occupied or used.

I believe all the preliminaries, such as notice of the fire, certificate, &c. are all regular, &c.; and the questions presented are, 1st. Whether an insurance of a building as a dwelling-

house is destroyed if the same is occupied as a boarding-house ? 2d. Whether the keeping of liquor in decanters, or vessels, as is usual in taverns, for daily use, *is the storing of liquors* within the meaning and true construction of the policy, which prohibits, in express terms, *the storing of liquors* ? 3d. Whether the house insured was, at the time of the fire, in April, 1837, a tavern ?

The whole contract between the parties is to be found in the policy, the whole of which (both form and substance) is made by the insurers ; we must therefore look to it for the terms and conditions on which this insurance was made. In that we find it is agreed and declared (and in the policy it is declared that it is made and accepted in reference to the proposals and conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for) to be the true intent and meaning of the parties, that in case the said dwelling-house shall at any time after the making thereof, during the continuance of the said policy, be appropriated to, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the proposals annexed to the policy, or for the purpose of storing therein any of the articles, goods, or merchandise, in the same proposals denominated hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by the said insurers in writing, to be added or indorsed on the policy, then and thenceforth, as long as the same shall be so appropriated, applied, or used, the said policy shall cease and be of no force or effect. And we must look to the proposals referred to for further explanation, and in them we find a classification of goods, and trades or occupations, some denominated not hazardous, some hazardous, and some extra hazardous ; and of the goods denominated hazardous, we find booksellers' stock, china, glass, and earthen ware, in packages ; flax, hemp, jewellers' stock, mechanical instruments sellers' stock, oil, pitch, pictures and prints, spirituous liquors, saltpetre, tar, turpentine, and watchmakers' stock ; and of the trades denominated hazard-

ous, we find chair makers, chocolate makers, confectioners, milliners, sail-makers, ship chandlers, tavern-keepers, and tobacco manufacturers. And as in the goods and trades denominated extra hazardous, neither spirituous liquor nor tavern-keepers are mentioned, it is unnecessary for the purpose of this case to set out the names of the various articles and trades of that class.

We are to look at the evidence in the case, to see if the house, during the policy, and at the time it was burned, was appropriated, applied, or used for the purpose of carrying on therein any trade, business, or vocation denominated hazardous, or specified in the special proposals. Or if it was used for the purpose of storing therein any of the articles denominated in the proposals as extra hazardous, for if so used for either purpose, it will avoid the policy.

The defendants say the house was kept as a boarding-house; but this, I apprehend, will not destroy the policy; there is no specification which makes a boarding-house an extra risk, and when so used it is still a dwelling-house and a private house, as distinguished from a public house or tavern; and as it was not mentioned or specified in the proposals annexed to the policy, it was not therefore prohibited from being so used.

It is said that the house was kept as a tavern, but I think the evidence does not make out that fact. A tavern is a different house from a boarding-house, or one where provisions are prepared and sold to boarders, or others calling in for accommodation: and though they may get liquor in the house, yet it is not a tavern under the meaning of the term generally used in the country, or as I apprehend, as used in this policy.

It is proven that liquor was kept and sold in the house, but I don't find in the contract or proposals any prohibition of keeping in the house liquor for sale or use, in casks, demijohns, or decanters. The prohibition is that liquor shall not during the policy be stored in the house. Now I think there can be no misunderstanding as to what was meant by storing liquors; it never could mean the keeping liquors in a house for home consumption.

In the case of the *New York Equitable Insurance Company v. Langdon*, 6 Wend. 628, the court say the only question is

Double Insurance. — Identity of Goods.

whether the keeping of oil and spirituous liquors in the store, under the circumstances disclosed in the case, was a storing of such articles.

This case in New York was an action brought on a policy, like unto the one made in the case in which a store was insured, and in the policy spirituous liquors and oil were classed among the hazardous articles; and in the store insured the tenant kept a family grocery store, and had on hand at the time of the fire various kinds of spirituous liquors and oil, and other articles usually kept in a grocery store, all which were kept for the purpose of selling out by retail, in small measure, in the store. It was decided that this was not a storing of spirituous liquors, within the meaning of the policy. The word storing was intended by the parties to mean the keeping such articles for safe custody, to be delivered out again in the same condition substantially as when received, and applied only when the storing or safe keeping is the sole or the principal object of the occupant, and not where it is merely kept for the purpose of consumption or sale. In my opinion there was no forfeiture of the policy, and the plaintiff had a right to recover his damages sustained by the fire, and the rule for a new trial ought not to be granted.

Rule discharged.

WILLIAM NEVE vs. THE COLUMBIA INSURANCE COMPANY.¹

(Court of Appeals, South Carolina, February Term, 1842.)

Double Insurance. — Identity of Goods.

Where a party obtained from two different insurance companies a policy of insurance for the same stock of goods; and by one policy (to wit), the one obtained from the defendants, it was expressly stipulated, "that in case the buildings or goods herein mentioned have been already, or shall be hereafter, insured by any policy issued from this office, or by any agent for this office, or by any other insurance company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or indorsed on this policy; otherwise this policy to be void." *Held*, first, that the question of whether the stock of goods described in this policy was the same as those described and covered by the policy in the Charleston Insurance Company, was a question properly for the jury, and their finding will not be disturbed.

Secondly. It was *held*, that the policy of insurance obtained from the defendants was void, by the terms of the policy. It having been obtained by fraud and misrepresentation.

¹ 2 McMullen, 220.

THE report of BUTLER, J., was as follows :

This was an action upon a policy of insurance for \$2,000, effected by the plaintiff, at the office of Mr. Alexander Robinson, agent for the defendants, on the 1st January, 1840, on "a stock of Groceries, Liquors and Wines, &c., contained in the two story wooden building," &c. The premises were destroyed by fire, on the night of 27th April, 1840, and the next day the claim of the plaintiff was made, in which his whole loss was set down as \$6,500, upon his stock in the store. In the policy of insurance is contained a special clause, guarding against a double policy ; and the defendants objected to the plaintiff's recovery, upon the ground that this clause had been violated ; and secondly, upon the ground, that the plaintiff had fired his own premises. It was admitted in the progress of the trial that the second ground could not be maintained, so that the case turned entirely upon the first ground.

It was proved that in May, 1839, one Kohnke was the proprietor of the stock of groceries, &c., in the same store, and that he sold them to Neve, the plaintiff, upon an agreement that Neve should pay him \$1,200 in cash, should confess judgment for the balance, and take out a policy of insurance, and assign the same to Kohnke. Neve, therefore, made an offer for insurance, at the Charleston Insurance and Trust Company, for \$2,500 upon the stock, valued at \$3,000, and upon the offer made a written entry that the policy was to be assigned to Kohnke. The policy was effected accordingly, and on the face of it was written by the agent of the company, "This policy may be assured to C. F. Kohnke." Mr. Moise acted as the attorney of Kohnke, took the confession of judgment for him, and the policy of insurance was delivered to Kohnke's agent, and never, at any time, had been in Neve's possession, or was claimed by him. It was considered as assigned to Kohnke, and when produced at the trial, had an assignment indorsed thereon, written, however, since the action was commenced. After the fire, Kohnke's agent, Mr. Moise, made a claim for payment of this policy, which was refused, upon the grounds stated in my report of that case.¹

Mr. Robinson, agent of the Columbia Insurance Company, proved that Neve applied to him to effect insurance on the stock in November, 1839 ; that they could not agree as to the rate of

¹ *Post*, 154.

Double Insurance. — Identity of Goods.

premium, and separated. In January, 1840, Neve again applied, and Robinson asked if he had stood his own insurer since they had before conversed. It appeared that in the offer made in writing to Robinson, and which was in Robinson's handwriting, that the stock was originally set down as worth \$6,000; which sum was, however, struck out, and without filling up again that column, \$3,000 was set down in the next column, as the amount to be insured, and \$2,000 in the column in which was placed the amount actually insured. Mr. Robinson stated, that he went round himself to inspect the stock, and considered it worth about \$3,000; that he returned to his office, and that he remembers having asked Neve whether he had any other insurance upon the property; to which Neve answered in the negative. On the other hand, a witness for the plaintiff (Mr. Rose) swore that he was present at the time, having gone with Neve at his request, and that Neve told Robinson of the insurance made for Kohnke's benefit, at the Charleston Insurance and Trust Company. This evidence is in writing and cannot be referred to.

There was a contrariety of evidence, also, as to the value of the stock. Mr. Neufville, who dealt at Neve's store, thought his stock worth \$4,000. Mr. Estell proved, that hearing that Neve wished to sell, he brought him a purchaser who wished to buy; and both parties being desirous of trading, he presumes that Neve fairly valued his stock, and that he asked for it \$4,500. It was also proved, by the production of various bills of parcels, that Neve had purchased, from January to April, articles costing about \$2,200, exclusive of the original stock. The assessment, too, of the tax collector was produced, assessing the stock as worth \$4,000.

On the part of the defendants was produced Neve's claim, swearing the stock to be worth \$6,500, and the evidence of several witnesses, who merely testified in general as to the value of stocks, without seeming to know anything of this particular stock.

I charged the jury on the different questions made in the argument as follows: The main questions upon which the case turned were these: Did Neve procure a double policy to be effected on the same stock of goods? And 2d, Was the last (the one on which the action is brought) obtained by misrepre-

sentation and fraud? Whether the policy underwritten by Robinson was void or not, depended altogether on the character of the one effected in the Charleston Office, and the legal rights of the parties under it. It purports to be an assurance on goods to which Neve had exclusively a legal title; Kohnke had no legal interest there at all, nor any special lien. His lien, by confession of judgment, was general, and even contingent, and I thought this was not an insurable interest, and was not embraced at all in the policy. Indeed, I thought Kohnke held the policy as collateral security only. My judgment on this point underwent some change in the argument of the case against the Charleston Company. The modification of my judgment will be seen by reference to my report in that case.¹ This does not, in anywise, however, affect the result of my decision on the case under consideration. For although Kohnke may have had some interest, it was limited and special, and did not deprive Neve from having a concurrent interest with him in part, and an exclusive interest as to the other part. This will be apparent from this view. Suppose no other policy had been effected but the one in the Charleston Company. That would have been good against the company for \$2,000; and it would have been good for the benefit of Neve, enabling him to pay a debt of \$1,000, and giving him besides, for his own use, \$1,000 more; it would have been worth to him \$2,000. But concede that Kohnke had an interest by assignment in the policy; and he could not have it without an interest, no policy ever being good without some interest to be protected; still Neve had an exclusive interest, to the amount of \$1,000. That was his own insurance to that amount, in which Kohnke had no concern. Was not then the second policy a double insurance, on the same stock of goods? I think it was, and so charged the jury.

The other question noticed was one of fact, to wit: Was this second policy procured by misrepresentation and fraud? Mr. Robinson swore that it was, and gave satisfactory reasons why it was so obtained. The evidence of the other witness (Rose) would seem to conflict with Robinson's statement. If notice of former insurance had been given to Robinson, it was his duty to have noted it in his policy, which was not done; and

¹ *Post*, 154.

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I am inclined to think that the omission is evidence that he never received such notice. Be that as it may, it was a question that was submitted to the jury.

Another question was made, but which was also one of fact: that the two policies were on different stocks of goods. The stock insured is described in the same way in both policies. Though some things were sold and others bought, they had reference to the same general stock. The contract of insurance is one of indemnity, for such loss as the assured may suffer by the destruction of goods of a particular cask of wine, &c., which might be in the store at the time; and if it were not so, the assured would be generally the sufferer, for within a year he may have sold the specific articles that were in the store at the time the policy was taken.

All the questions of fact were submitted to the jury under my views of the law, as above stated. The most important issue of fact was, whether Neve had not fired his own house; upon that issue, much evidence was given which it is unnecessary to notice here. The jury found a verdict for the defendants, and the plaintiff appealed, on various grounds: all of which are resolved into the question, whether the same stock of goods have been twice assured or not.

Kunhardt, for the motion.

H. A. De Saussure, *contra*.

Memminger, in reply.

Curia, per BUTLER, J. In approaching the questions in this case, many of the difficulties have been removed by the opinion of the court in the case of *Neve for Kohnke v. The Charleston Insurance Company*.¹ Whether the stock of goods described in this policy was the same as that described and covered by the Charleston policy was a question of fact, properly submitted to the jury, and so far from our being dissatisfied with their finding, we think there was sufficient evidence to have warranted it. At the time the goods were sold to Neve they were estimated to be worth not more than \$2,200, and it seems probable at least, that at that time he had no means of his own to increase the stock, and the profits must have been excessive, if by them he subsequently increased its value to \$4,000 or \$6,000. He himself suffered his stock of goods, at two different times, to be,

¹ *Post*, 153.

valued at \$3,000, by taking a policy on them at each time for \$2,000. This question of fact being settled by the verdict, we must assume that two different policies have been taken on the same stock of goods. And the main question in the case now occurs, Was the policy on which this action is brought a double policy, and procured to be made without notice or by a suppression of truth, in relation to the first? Because if so, it is void by the terms of the policy itself, which contains this explicit clause, "In case the buildings or goods herein mentioned have been already, or shall be hereafter insured by any policy issued from this office, or by any agent for this office, or by any other insurance company, or by any private insurer, such other insurance must be made known to this office, and mentioned in or indorsed on this policy, otherwise, this policy to be void." The Charleston policy is not mentioned in or indorsed on this policy; and I think the evidence was entirely satisfactory, that no notice at all of the former policy was given to the underwriters of this; otherwise, why was there not a memorandum of it? Stript of all the extraneous circumstances, the question resolves itself into this. Was Neve, the plaintiff, bound to give notice of the first policy? In fair dealing and good faith, we think he was. If he had parted with his entire right in the first insurance, by an equitable assignment to Kohnke, he might possibly have felt himself at liberty to take this policy without notice. I am, however, very far from sanctioning such an idea. He had the exclusive title to the goods insured, and does not occupy the position of a mortgagor, who had assigned to his mortgagee a policy taken to secure his interest, and who might have been at liberty to take out another policy to secure his own, to wit, an equity of redemption. Such was the case in 7th and 17th Wendell, referred to in another opinion. There are many good objections to the judgments on this point, in the cases referred to, but I am not called on to review or sanction these decisions. They may well stand on their peculiar facts, whilst the question in the case before the court would not be affected by them, for it has been shown, that at no time had Neve parted with his entire interest in the Charleston policy. He placed it in the possession of his judgment creditor, with only an equitable and

Notice of Loss. — Waiver. — Assignment of Policy.

limited interest in it. Independent of Kohnke's lien on the papers, Neve still could have collected the policy, and realized from it \$1,000. In fact, it was legally his policy, and honesty required that he should have given notice of its existence, before he procured the one on which this action is brought. In addition to the fact of his giving no notice, as required by the policy, he suppressed the truth in relation to the former one, for he said to Mr. Robinson, that there was no other policy on the stock of goods, and that he had stood his own underwriter. If this be true (of which I have little doubt), the plaintiff was guilty of a flagitious fraud, which in fact made his policies worth more than his goods; and if he could have realized the sums called for by them, it was his interest that his goods should have been destroyed, as they were about three months after the last policy was taken, and about twenty days before the expiration of the first. Courts should sustain insurance companies in discountenancing double policies, as they weaken the inducement of the assured to take care of their property, and thereby jeopard the security and safety of whole cities. Prudence as well as justice induces us to sanction the verdict of the jury, which has condemned the bad faith of the plaintiff. Insurance companies run risks, which are the source of their profits, but they are entitled to have good faith observed toward them.

The motion is refused.

We concur: JOSIAH J. EVANS, D. L. WARDLAW.

O'NEALL, J., having an interest in the company, gave no opinion.

THE CHARLESTON INSURANCE AND TRUST COMPANY *vs.* W. NEVE, who sues for the use of C. F. Kohnke.¹

(Court of Appeals, South Carolina, February Term, 1842.)

Notice of Loss. — Waiver. — Assignment of Policy.

An insurance and trust company have the right, on a trial upon a policy of insurance, to insist upon and demand the production of the preliminary proof as a condition precedent to the plaintiff's recovery. But they may, nevertheless, have waived their right to call for such evidence, by some act on their part, when the policy was presented for payment. What is or is not a waiver of the preliminary proof, must depend on the circumstances and the language used at the time.

¹ 2 McMullen, 237.

Notice of Loss. — Waiver. — Assignment of Policy.

Where a party took a policy of insurance from an insurance and trust company upon liquors, groceries, &c., and the same day on which the policy was executed permission was given by them to assign the policy to a third person, it was *held*, that the party to whom the assignment was made was entitled to recover to the amount of the interest which he had in the policy, notwithstanding the party to whom the policy was granted had deprived himself of his right to recover by acts of fraud.

The plaintiff, placing the policy in the hands of a third party, to "assure" him, by consent of the underwriters, gave to the third party only an equitable interest, but such an interest as a court of law will recognize for the purpose of doing justice in a legal proceeding.

THE report of BUTLER, J., was as follows :

This was an action of assumpsit on a policy of insurance, made by the Charleston Insurance and Trust Company, dated the 13th day of May, 1839. The amount insured was \$2,000, and the property insured was described in the policy as "stock groceries and liquors, contained in the two story wooden house, with shingle roof, situated at No. 31 State Street, and occupied by the assured in the grocery business, as described in the offer, No. 1983, filed in this office." It was in evidence that this store, which was a grocery and liquor store, had belonged to C. F. Kohnke ; that in May, 1839 (the precise day was not fixed in evidence), Kohnke had sold out the stock to William Neve for the sum of \$2,200, and of this sum \$1,200 were paid in cash, and to secure the balance Neve confessed a judgment in favor of C. F. Kohnke for \$1,000. The confession of judgment appears to have been entered up in the office of the clerk of the court of common pleas for Charleston district, the same day that the policy was executed. At the time of the execution of the policy by the defendant, permission was granted to Neve to assign the policy to C. F. Kohnke. A day or two after the date of the policy, Kohnke, being about to leave this country, placed the policy in the hands of John Klinck, who seems to have been his agent. There was no assignment of the policy, in writing, from Neve to Kohnke, at the time that it was delivered to Kohnke. The assignment which is now on the policy was written subsequently to the commencement of the suit. The sale from Kohnke to Neve was an absolute sale, and Kohnke seems to have retained no interest in the stock, except through his confession of judgment. In November, 1840, Neve applied for insurance on the stock in the same store, to Alexander Robinson, agent for the Columbia Insurance Company.

They could not agree as to the rate of premium, and no insurance was at that time effected. The first day of January, 1841, Neve again applied to Mr. Robinson for insurance. Mr. Robinson exhibited some surprise, and asked him if he had been his own underwriter, and asked him, also, if there was any other insurance on the property? Neve told Robinson that there was no other insurance on the property, and after an examination of the premises, Robinson, as the agent of the Columbia Company, insured the stock. The policy of the Columbia Insurance Company described the property insured as follows: "A stock of groceries, liquors, wines, &c., contained in the two story wooden building, with shingle roof, and in the cellar, No. 31 State Street, Charleston, occupied by him (William Neve) in the grocery business and as a residence."

On the night of the 25th of April, 1840, the building and entire stock was consumed by fire, and on the 28th, the next day, Neve rendered in a statement to the defendants of his loss, amounting in the aggregate to \$6,500. A question was made in the case as to the statement, and I have annexed a copy of it to this report. The same day on which Neve rendered his statement to the defendants, or soon after, Mr. Moise, who was the legal adviser of Kohnke, and in whose possession the policy had been placed by Mr. Klinck the day after the fire, went to the office of the defendants, and gave to the president, Mr. Street, notice of the claim of Kohnke, and seemed to have inquired as to the intention of the company, for Mr. Street informed him that he would prefer to submit the matter to the board of directors before he would give an answer. The next day, or soon after, Mr. Moise called again, and Mr. Street then informed him that the company declined paying the amount, because Neve had effected a second insurance, and because the directors believed that the premises had been fired by Neve, or some objection similar in substance, and manifesting that they supposed Neve had not acted fairly in the matter. Nothing further passed between the parties, and soon after this action was commenced for the present plaintiff.

At the trial of the case, the fire and the destruction of the building and contents were proved. The value of the stock was not a matter concerning which the witnesses agreed. The

stock in the store was proved to have consisted of groceries, liquors, and some inferior or common dry goods, such as home-spuns. And it seems that one side of the store was kept for these dry goods, but the value, as a portion of his stock, was not proved, except generally, that the goods were of a common kind.

Mr. Estill thought the whole stock worth about \$4,000, but his opinion was based upon the price that Neve had asked for the stock about six months before the fire, on some occasion when Estill introduced a friend of his to Neve, in consequence of learning from his friend that he was desirous of engaging in that kind of business, and learning also from Neve that he was desirous of selling out his interest in the stock and changing his business. Except from this circumstance, and a cursory view of the store, when he was making his purchases, he professed to know nothing of the value of the stock. Mr. Burckmyer thought the stock was worth about \$1,500. Mr. Rose, who was engaged to take an account of the stock at the time of the sale from Kohnke to Neve, proved that it was then put down at \$2,200. Mr. Robinson thought the stock was not worth more than \$2,000 or \$3,000. Upon this proof the plaintiff rested his case.

For the defendants several objections were urged.

1. That there had been no compliance with the eleventh condition of the policy; that no certificate, as is required by the terms of that condition, had been proved to have been submitted to the defendants; that a strict compliance with this was in the nature of a condition precedent, and without proving performance there could be no cause of action.

2. That the interest of Kohnke in this stock was not an insurable interest, and if it was, it should have been so described in the policy, and so represented at the time of making the insurance.

3. That there was no assignment of the policy. That mere delivery of the policy did not give the holder the right of an assignee, but only of a depositary, who had no higher right than the original assured.

4. That the policy being void, as far as Neve was concerned, by the second insurance, which he had made without notice, it was void also in the hands of all parties who claimed through him.

5. That there was sufficient evidence of fraud to warrant the jury in rendering in a verdict for the defendants.

In relation to the second insurance the following provision appears in the policy: "And if the said assured, or his assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect."

The same grounds that were taken below to resist the recovery are now taken on the appeal, and I will give the result of my judgment, rather than my reasons for it, on each one, in the order in which they are stated.

1. I regarded a compliance on the part of the plaintiff with the eleventh condition in the policy as a condition precedent, and that the defendants had a right to require a certificate from a clergyman or justice of the quorum, stating that he believed the property insured had been destroyed accidentally or without criminal design by the plaintiff; no such certificate was produced on the trial. The certificate of one Jeffries was produced, who was not proved to be, nor was he, I believe, either a clergyman or justice of the quorum. From the fact that plaintiff was advertised by plea of the defendant, that such certificate was required, it might be inferred that he could not produce one, for I am inclined to think that he would have regarded it as a sufficient compliance with the condition if the proper certificate had been produced at the trial. Although this preliminary proof was necessary to subject the insurance company to liability, it was, nevertheless, in their power to waive it, and to rely exclusively on other grounds of defence, and it was contended, on the part of the plaintiff, that such evidence had been waived when the policy was presented for payment. This depended entirely upon what Mr. Street said to Mr. Moise. Mr. Moise seemed to have regarded it as a waiver, as the proof was not insisted on at the time, and it may have been so. When, however, the agent of the company said that his refusal to pay was founded on the belief that Neve had fired his own house as well as that he had effected a double insurance, it seemed to me (and I said so to the jury) it was not a

waiver of any evidence that was requisite to satisfy the company that the house was not burnt by design. As I observed by adjudicated cases, that this is always a question of fact to be submitted to a jury, I submitted this to the finding of the jury. What is or is not a waiver of preliminary proof must depend on circumstances and the language used at the time. In general, I think it is right that the company should insist on the proof at the time the policy is presented for payment after the loss.

2. It was apparent that Kohnke had no legal interest in the property insured. His only interest was that of a general lien by his judgment to the extent of \$1,000. 1st. Was this an insurable interest? and 2d. Was it the interest which the company had in view at the time the policy was underwritten? I am now inclined to think, as I thought on the trial of the case (though I did not think so on the trial of another case with which this is connected), that a lien by judgment may be made the subject of insurance; it is insurable, provided it be known to the underwriters to be the subject of the policy. The great security which the underwriters have against the risks insured against is, that the assured shall have an interest to preserve the property, hence they will rarely insure beyond the interest of the assured. The underwriters consented in this case that the policy might be assigned to Kohnke, and from that circumstance they may have been aware of Kohnke's interest. I would infer, however, that they supposed the confession of judgment was for the whole amount of the goods sold. I said to the jury, that if they were satisfied that the company knew what Kohnke's interest was, they might regard the policy as covering for his benefit.

3. On this ground I have great doubt; the assignment was not written until after the risk had occurred, but the policy was put into Kohnke's possession at the time it was executed. Indeed, it was said that Neve never had possession of the paper: Was the delivery to Kohnke a good assignment? The policy being a chose in action, was not assignable so as to give the transferee the right to sue on it, or to enforce any strict legal right in his own name. Assignment of such papers will give the assignee such equitable rights as will be respected in a

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court of law, and if the policy was sufficiently assigned, the court ought to give to the assignee the profit of it, in the name of Neve, the original assignee, or the person in whose name the property was insured. For the purpose of having all the points in the case decided, I told the jury that an assignment of the policy by parol should be regarded as sufficient.

4. If the plaintiff was entitled to recover at all, what should be the measure of damages? The action was in Neve's name, and was brought to recover \$2,000; and a recovery for that amount ought to have been had, if the policy were not affected by a subsequent double insurance. Neve did procure another policy to be effected in the Columbia Office, on a stock of goods of the same description as those described in the policy, and the finding of the jury establishes the fact, which was well warranted by the evidence, that the last policy was procured by fraud and misrepresentation, otherwise it would not have been underwritten by Robinson, the agent of the Columbia Office. Where the assured have double policies, they have little interest to take care of the property insured, and might yield to a criminal temptation to destroy it. Was, then, the making the second policy a double policy? This depends on the character of the first, and Neve's interest in it. But for the last, the first would have been good for \$2,000, to be divided between Neve and Kohnke. As far as Neve's interest was concerned, I thought it forfeited by his fraud. Did this deprive him of the right of recovering for Kohnke the extent of his equitable interest? I thought not. The jury found against the defendants on all points in which Kohnke was concerned, and found for the plaintiff the amount of Kohnke's interest in the policy, to wit, \$1,000 with interest.

"Statement of the loss of William Neve, on his stock in trade, at the fire on the 27th April, 1840, in the Charleston Insurance and Trust Company, for \$2,000, assigned to C. F. Kohnke — store situated in State Street.

Amount of stock in store, \$6,500, which consisted of liquors, to wit: —

Wine and brandy	\$5,300
Porter, ale, and cider	200

Groceries, to wit:

Sugar, tea, and rice, &c., &c.	1,000
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\$6,500

"There was nothing saved."

Grounds of appeal: 1. That the condition in the policy, as to the mode and form of stating a loss, is a condition precedent, on the part of the assured, and that until the statement of the loss and claim is made as directed in the said condition, there is no cause or right of action against the insurer. That in this case there was no sufficient proof of a waiver of the preliminary proof, or any part of it.

2. That the party plaintiff must prove an interest existing at the time of making of the policy, and at the time of the loss. And that in this case there was no proof of interest at the time of making the insurance.

3. That a policy on groceries and liquors, assigned to a judgment creditor, does not protect the judgment creditor in case of a loss. Because a judgment is not an insurable interest, and because if it is, it is not covered by a policy on groceries and liquors, but ought to be described specially.

4. That an assignment of a policy of insurance, to be valid so as to entitle the assignee to a right of action against the assured, must be a perfect transfer of the right of the assignor, executed in as formal a manner as the instrument to be assigned.

5. That the possession of a policy without assignment in writing gives the party holding the policy only the rights of a depositary, and makes him liable to all the defences against the original insurer.

6. That the second insurance by Neve vitiated his claim, and all parties claiming through him. That Kohnke, being a mere depositary, and claiming through Neve, is barred of all claim, from Neve having avoided the policy by a second insurance without notice.

7. That the facts of the case sufficiently made out a case of fraud, which is sufficient to avoid the policy of insurance.

8. Because the verdict was in other respects against law.

Magrath, for the motion.

Kunhardt, *contra*.

Curia, per BUTLER, J. This case presents some questions of intricacy, rather from the confusion with which the parties have made their contract, than from any difficulty in pronouncing on the justice and legal character of the principles involved. Poli-

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cies of insurance are made on the confidence that the contracts under them will be observed and kept in good faith by all the parties connected with them; and they should be freely and liberally construed by courts to effect the intention of the parties; when the risk occurs which is covered by the policy, the underwriter should promptly indemnify the assured, without evasion or complaint. On the other side, the policy should always be obtained on fair representation, and the risk should not be subsequently increased by fraud and misrepresentation. The finding of the jury in this case convicts Neve of a fraud, and is a censure on the company for insisting on the preliminary proof, so far as Kohnke is concerned; one may be just, but I think the other is not; I thought at the circuit, and am still inclined to the same opinion, that the defendant had a right to insist at the trial on the production of the preliminary proof, as a condition precedent to the plaintiff's recovery. A majority of the court think, however, that the proof was waived by the company when demand was made for payment of the policy, and they therefore sustained the finding of the jury on this point. It is always in the power of the underwriter to insist on the evidence alluded to, at the time the policy is presented for payment; and when it cannot be produced by the assured, it would be strong evidence that the risk had not been the result of accident. At any rate, having contracted with the underwriters that a stranger would do some act to entitle the assured to recover, the stipulation, however unreasonable, must be complied with; I do not think myself that such a stipulation is unreasonable. It is founded in prudence, and should not be dispensed with on the part of the underwriter, when there is good ground to believe that the risk has been brought about by fraud and criminal design. The defendants in this case may have forbore to demand the preliminary proof, under some apprehension that if it had been produced, it might have prejudiced their case on the trial of the main issue. I do not think that there was any intention of a waiver on their part. But their conduct may have deceived others, who might have been able at the time to comply with a specific regulation, if it had been made. And as they did not make the requisition at the time, it is perhaps right. This point must therefore be re-

garded as ruled against the defendants by the verdict of the jury. All the other grounds resolve themselves into this question. Had Kohnke, at the time the policy was executed, or afterwards, any interest in it that can be recognized and protected in a court of law? And if so, was it such an interest as could not be destroyed by the hand of Neve? Which involves the further question, had Neve any interest at all in the policy after it was transferred to Kohnke by delivery; retaining no right in himself? It is certain that by the terms of the policy Kohnke had no legal interest in it that could be enforced in his own name. The policy is taken in Neve's name on property of which he had the legal title. The premium on two thousand dollars for property valued at three thousand, at the rate of two and a half per cent., was paid by him. In placing it in possession of Kohnke, by the consent of the underwriters, to "assure" Kohnke, as it is expressed, he gave Kohnke thereby only an equitable interest,—such, however, as a court of law will recognize for the purpose of doing justice in a strictly legal proceeding in the name of the assured. Had the policy been assigned in the most solemn form, it would not have given Kohnke a legal right to sue in his own name, or to insist on any legal right.

In such case he would have had no more than an equitable interest. As a depositary, he has the same interest, if the policy was delivered to him before the risk happened, of which there could be no serious doubt. Whatever his interest was, though equitable, we think was acquired *bond fide*, by the consent of the company. They knew the circumstances under which the stock of goods was insured; that they were in the actual possession of Neve, while the other had a general lien on them. And the company undertook to protect this general lien by letting the policy go into the possession of Kohnke as his assurance; and they could not deprive him of the benefit of this security without fault on his part. If it had been otherwise, perhaps, the risk would not have happened, as it may have increased Neve's interest to procure another policy, and diminished his diligence in taking care of the goods in his store. The vigilance of self-interest is the eye of prudence; and when that is weakened, the underwriters of a policy increase the danger of

their liability. They must do what they intended for Kohnke, and cannot let his rights suffer by the wrongful acts of Neve. We think, therefore, that as this action was in fact for Kohnke's benefit, he was entitled to be indemnified to the extent of his injury. According to this view, it will appear that Kohnke had not an absolute, exclusive, and indefeasible interest in the policy; but that as an additional security to his confession of judgment it was contingent, collateral, and accumulative. In no event was it worth to him more than \$1,000, whilst it might have been worth to Neve \$2,000. Could it be questioned that Neve had it in his power to redeem this security, and to acquire a perfect title to it by satisfying the judgment? Suppose he had paid off the judgment in two days after it was confessed, would the underwriters of the policy have been entirely discharged? Such a pretence, on their part, would have been inconsistent with common sense, and their undoubted intention at the origin of their contract. They never could have supposed that they had improved their condition, when they consented that Kohnke should be assured or have an assignment of the policy. They always regarded themselves as liable for \$2,000, provided goods to that amount should be destroyed accidentally by fire. The fact of suffering two parties to be interested in the same policy, could not diminish their liability. As an action on a policy of insurance is one of indemnity, no party can recover beyond his loss; and if but \$20 worth of goods only had been destroyed by the fire, no party could have recovered beyond that amount; and for the like reason, should no party be allowed to recover beyond his actual interest. The jury, therefore, properly restricted the recovery of the plaintiff in this case to Kohnke's loss, notwithstanding goods to a larger amount may have been destroyed; for Neve, by his own unfair dealing, subsequently deprived himself of any right to avail himself of any interest under this policy; as it contains the common clause, that if any subsequent policy should be obtained on the same stock of goods, without notice, this policy should be void. As it will appear, in another case, a second policy was obtained without notice, and for that reason it is right that Neve should forfeit his rights under this by his own fraud. It is said, however, that Neve, having parted with all right to this policy, he had no in-

terest in it; and therefore, he was at perfect liberty to procure another without notice. That suggests a recurrence to the question, what interest had Kohnke in this policy? I have before said that he had the indefeasible interest of a surety — and I think that this view is fully supported by the final judgment in the case of *Robert v. The Traders' Insurance Company*, 9 Wendell, 404, 474; 17 Wendell, 631. In that case, Robert had procured policies of insurance on certain buildings, which were mortgaged to one Bolton. The policies, by the consent of the company, were assigned to Bolton. After the houses were burnt, Bolton, in the name of Robert, recovered judgment on his policies; this judgment was paid off by and assigned to Robert, who thereby claimed all the rights intended for him under the original policy, and it was decided that his right to the policy was restored so soon as he removed the mortgage, or paid the judgment rendered on its foreclosure. The case was elaborately considered and carried through all the courts of New York. See it as reported in 17 Wendell, 631. Senator Edwards delivered the final judgment in the court of errors. Speaking of this question, he says: "Let us then, in the next place, inquire how far the rights of the parties were affected by the assignment. Thomas Robert owed Francis Bolton a debt of \$5,500, secured by his bond and mortgage on the buildings in question, &c. He owned three policies of insurance, in each of which it was stipulated that the interest of the assured was not assignable without the consent of the company manifested in writing. That right being obtained, &c., the policies were assigned to Bolton as collateral security for the payment of his mortgage. Did the fact, that they were so assigned, give Bolton the absolute indefeasible interest in the policies, or only a collateral interest for the time being? I am of opinion that he had only a collateral interest, liable to be divested whenever Robert paid the mortgage; and when the company consented to the assignment, they consented to it for the purposes for which it was made, and this consent gave him the right then; but this could not alter or diminish the extent of the liability of the company." This case does go so far as to say that after Robert had made his assignment, he could take another policy on his interest as mortgagor without notice of the policy assigned. I suppose that

was on the ground that he could act *bonâ fide* in taking a subsequent policy whilst the right under the assignment subsisted. Whether I could sanction, by my judgment, this part of the case, I am not called on to determine. For the right of recovery on the different policies would depend on the interest at the trial; and the second policy might be worth little or nothing, if there could have been a full recovery on the first. The point I wish to present is, that the first policy was not absolutely vested in the assignee Kohnke — and all that could be recovered on it was Kohnke's interest, when Neve had forfeited his right under it. Had Kohnke held the policy under an assignment made contemporaneously with its execution, as his only security, then he would have been entitled to recover the whole amount, provided the goods destroyed were not of less value than that amount at the time of the fire. In *Hambleton v. Mendes*, 2 Burr. 1210, Ld. Mansfield said: "The plaintiff's demand was for an indemnity; his action then must be founded on the nature of the damnification, as it really is at the time of the action brought." The recovery of Kohnke might have been less than the \$1,000, but could not have been more. This shows that he had not the entire interest in the policy; and if the whole amount could have been recovered, it would have been as much for the benefit of Neve as Kohnke — the one having a legal and the other an equitable interest. Neve's right became extinguished by his taking another policy without notice of the existence of the first. In attempting to procure two policies, he forfeited, by the terms of the policies themselves, his right to recover on either, as will be seen when the case of the Columbia Company comes to be considered.¹ We think the jury have hit the justice of the case, and therefore refuse this motion to set aside their verdict.

RICHARDSON, O'NEALL, EVANS, BUTLER, and WARDLAW, Justices, concurred.

¹ *Ante*, p. 147.

ANDRÉ MARCHESSEAU vs. THE MERCHANTS' INSURANCE COMPANY.¹

(Supreme Court, Louisiana, March Term, 1842.)

Insurable Interest. — Value of Goods. — Fraud.

The contract of insurance is, essentially, one of indemnity; and this indemnity must be adjusted on the principle of replacing the insured, as near as may be, in the situation he was in at the commencement of the risk. The amount of insurable interest is the market value of the articles at the time and place of the commencement of the risk; and where they have been purchased near that time and place, the cost to the assured is most satisfactory, though not the only criterion of their value.

Under a policy of insurance, which provided that if there should be any false swearing on the part of the assured, he should forfeit all claim to the policy, a failure by the latter to sustain his affidavit, by direct evidence, to the amount claimed, will not be considered as proof of his having sworn falsely, and thereby forfeit the insurance. In open policies, it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by testimony the great probability of the truth of the affidavit; and in weighing this testimony, the character of the assured, as well as the credibility of the witnesses, must be considered.

APPEAL from the parish court of New Orleans, Maurian, J.

GARLAND, J. This suit is brought to recover \$15,549, on an open policy of insurance against fire, on certain merchandise in a shop in New Orleans, which was consumed on the night between the 29th and 30th of September, 1838. The defendants say, they are not responsible, because the plaintiff has not sustained a loss to the amount claimed. They allege that proper preliminary proof had not been furnished, and that no inventory was ever presented or deposited with them. They further say, that after diligent inquiry, they are unwillingly induced to believe, and so aver, that the conflagration occurred with the knowledge of the plaintiff; that he participated in it through his agents; and that if any loss has occurred, they are not responsible under the terms and qualifications of the policy, as to good faith on the part of the assured.

The evidence shows that the plaintiff arrived in New Orleans, in December, 1837, or in the commencement of the year 1838, with a stock of goods from France; that he opened a shop, and did business as a merchant until sometime early in July following, but to what extent is not clearly shown.

On the 2d of July, the defendants signed the policy, and it

¹ 1 Robinson, 438.

appears very certain that the plaintiff had about that time made an inventory of the goods, which, he says, he had on hand, and that when he went to effect the insurance, he took it with him; but a secretary or clerk in the office says, that he refused to take it, although offered to him, or even to look at it. This witness says, that the plaintiff took it away, and that he has never seen it since. He did not even look at it for the purpose of filling up the policy, as it was not customary to receive inventories, the plaintiff having told him the amount. The plaintiff departed for France a few days after effecting the insurance, and the house in which the goods were stored was destroyed by fire nearly three months afterwards, he being absent.

The clerk of the plaintiff says that he assisted in making the inventory. He called out the numbers and prices of the goods, and the plaintiff wrote them down; they were then packed in boxes, baskets, or bales, and carried by another person to the third floor or garret of the building. There were three or four hundred packages. There is abundant testimony, that there were a great many packages, and no doubt they were full of something.

It is proved that the key of the store was left in the possession of the owner of the house, but that it was occasionally given to François Marchesseau, a brother of the plaintiff, who was acting as his agent, although he had no special authorization, and visited the shop occasionally. The evidence on the part of the plaintiff is, perhaps, sufficiently certain to sustain the verdict, except in two important particulars, to wit, that none of the witnesses swear to the value of the goods, and that there is no explanation of the great difference existing between the value, as it appears from the invoices filed in the customhouse, on which the plaintiff made his entries and paid duties, and the large amount at which the same goods are valued in the inventory. Pascal, who assisted as clerk in making the inventory, does not swear that the goods were put down at their true market value, nor that there was the quantity stated. He says that "he called the numbers and prices," and that the plaintiff wrote them down; but he nowhere says, that they were correctly written down, as to quantity and value. Other witnesses fully corroborate Pascal in his statement as to the

marking of the inventory, but none fix any particular value on the goods. It is shown that the plaintiff brought all the goods from France; they must then have passed legally through the custom-house. From it, the defendants have procured copies of the invoices on file, and they do not amount to much more than one third of the sum claimed. They were sworn to by the plaintiff, and the defendants insist that he shall abide by them, adding thereto a fair allowance for risk and charges, and then deducting the probable amount of the sales made in the course of six months of business. The jury found a verdict for \$8,000, on which judgment was rendered in favor of the plaintiff; and the defendants, after an ineffectual attempt to obtain a new trial, appealed. They ask us for an entire reversal of the judgment, and the plaintiff asks that it be amended, so as to give him the whole amount claimed. In this court the defendants have waived the question as to the preliminary proof, and have met the plaintiff by an accusation of attempting to defraud them by false swearing, and by an over-valuation of the goods, by which they say the policy is forfeited according to its ninth condition, which is as follows:

“All persons assured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company; and as soon after as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation, and also, if required, by their books of account and other proper vouchers; they shall also declare on oath, whether any and what other insurance has been made on the same property; and until such proofs and declarations are produced, the loss shall not be payable. Also, if there appear any fraud, or false swearing, the claimant shall forfeit all claim by virtue of this policy.”

Upon a thorough examination of the evidence, we are not satisfied with the verdict of the jury, nor are we convinced that the defendants' accusation of fraud and perjury is sustained. It is evident that the jury did not think that a loss to the amount claimed had been sustained, but that they thought that there had been some loss, and allowed \$8,000 to cover it. In questions of this kind we are disposed to pay much respect to the opinions of a jury, but in this case we are unable to see

from the testimony how they could arrive at the result to which they came. The definite or approximate value of the goods is not proved by a single witness, though it is certain that he had a considerable stock on hand ; and the great disparity between the invoices and the inventory is unexplained. On the other hand, the conduct of the defendants is not altogether free from suspicion and reproach. When the insurance was effected, an inventory and valuation was offered, by which they might have seen what they were insuring, and from an examination of it have found whether the goods were estimated too highly. To get the premium seemed then the principal object, and after the loss occurred, the evidence shows that they were disposed to stand upon the most rigid rules both of etiquette and law. The evidence is calculated to produce the impression that documents or papers in relation to the loss, and preliminary proofs were unwillingly received, and that when left, against their wishes, that they were lost, destroyed, or suppressed. They probably acted under a suspicion of some unfair proceedings on the part of the plaintiff or his brother, but we cannot see any evidence to justify a charge that the plaintiff was in any manner the cause of the fire and consequent loss of the property, however guilty others may have been. He had been absent from the state nearly three months in Europe, the key of the house was in the possession of the owner, and no one is shown to have been in the shop for some ten or eleven hours previous to the fire.

The contract of insurance is one essentially of indemnity ; and good faith on both sides should be its basis. It is not its object to put the assured in the same situation, in case of loss, in which he would have been, had the adventure, on which it was effected, terminated successfully. He must, particularly in open policies, take some of the chances of his speculation, and of the state of the markets. The indemnity must therefore refer to the beginning of the risk, and the losses are to be adjusted on the principle of replacing the party assured, as nearly as may be, in the situation he was in at that time. The amount of insurable interest is the market value of the goods at the time and place of the commencement of the risk, and the best, though not conclusive criterion of this interest, is the cost to the assured. This is the most satisfactory proof of value, in

case the goods were purchased near the time when, and at or near the place at which the risk commences. Therefore we do not look upon invoices of goods, purchased in France some eight or ten months previous to the commencement of the risk, as the true criteria of value here; but when they are produced, and it appears that there is a difference of nearly three hundred per cent., it certainly requires explanation, and strong evidence of there being so great a difference in the state of the markets in the two countries. We are not disposed to go to the extent contended for by the defendants' counsel, that if the plaintiff fail to sustain his affidavit by direct evidence, to the amount claimed, he is to be considered as having sworn falsely, and thereby having forfeited the policy. In open policies it would, in many, if not in a majority of cases, be extremely difficult to prove the actual value of the goods lost. It is therefore sufficient to show by testimony the great probability of the affidavit being true, and in weighing this testimony, the character of the assured is a circumstance to be considered, as well as the credibility of the witnesses. The character of an assured party is not to be blasted, and his policy forfeited for which a premium has been paid, simply because he cannot prove the value of every article lost.

But if an account is made out to be feigned or fraudulent, there cannot be a doubt but that the policy is forfeited; and a wide difference between the cost and the valuation, is a strong circumstance, and if unexplained, should have its due weight upon the jury. This seems to have been the opinion of the court in the case in the 20th English Common Law Reports, 158, so much relied on by the counsel for defendants, and we shall pursue the same course that was adopted in that case, and grant a new trial, more particularly as both parties complain of the verdict.

The judgment is therefore reversed, and the case remanded to the parish court for a new trial; with directions to the judge thereof to proceed therein in conformity to the principles herein expressed, and according to law; the plaintiffs and appellees paying the costs of the appeal.

Roselius, for the plaintiff.

Grymes, for the appellants.

PRESIDENT, DIRECTORS & COMPANY OF THE ORIENTAL BANK
vs. THE TREMONT INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1842.)

Interest. — Delay. — Use of Funds.

Interest is not necessarily recoverable on a policy of insurance, although the loss be not paid on the day prescribed by the policy, unless there is a positive stipulation to pay interest.

In the absence of any contract to pay interest, if the amount payable by an insurance company is attached in their hands by a trustee process in favor of a creditor of the assured, they do not become liable to pay interest during that time, if they practise no delay and are ready to pay upon being discharged from the trustee process, although they use the funds in their business.

THE whole case sufficiently appears in the opinion.

W. I. Bowditch, for the plaintiffs.

Fletcher, for the defendants.

B. R. Curtis, replied.

HUBBARD, J. The only question for the consideration of the court is, whether the defendants are bound to pay interest on the amount of the loss on the policy underwritten by them, from the time the same was payable by the terms of the policy, to wit, the 18th of February, 1839, to the 15th day of May, 1840, when they were discharged from the trustee process which had been pending against them, from the 19th of December, 1838, to that time. The plaintiffs assumed several positions, upon which they rely to charge the defendants with interest; and among others, that this was a contract to pay interest in sixty days after proof of loss of the subject of insurance; that, as stakeholders, they should have set apart a special sum to cover this loss, and not have mingled it with their funds; that the plaintiffs lost the use of the money, and the defendants had the use of it, and consequently the plaintiffs have the better equity.

The question submitted is not free from difficulty arising out of the great number of decisions in relation to the payment of interest. Nor is it practicable to reconcile all the opinions that have been pronounced in different courts, both in this country and in England. Many of the opinions, however, which ap-

¹ 4 Met. 1.

pear to be contradictory, may be reconciled by considering the different facts which led to the decisions. So that while the cases appear, on a cursory inspection, to be alike, they will be found, on a more careful examination, to differ in important particulars. The authorities relating to interest have been so often cited and reviewed, that it appears to me to be unnecessary to subject them to a new examination; although the elaborate arguments of the counsel on both sides might seem to demand it. Those only, therefore, will be referred to, which seem to require remark, as bearing on the opinion we have formed.

By the Rev. Sts. c. 109, § 34, it is enacted, that “any money or other thing, due to the principal defendant, may be attached before it has become payable, provided it be due absolutely and without any contingency, as before mentioned; but the trustee shall not be compelled to pay or deliver it, before the time appointed therefor by the contract.”

Two days after notice and proof of the loss, and before the same was payable, the defendants were summoned as the trustees of Clapp, the person with whom the contract was made; and this was before they had notice of the plaintiffs' claim. It was then rightfully at the time, as the property of Clapp; and when the defendants exhibited their order from Clapp for the payment of the money to them at the termination of the sixty days after notice of the loss, the defendants were under no legal obligation to pay them the amount due on the policy; but their duty was, to give notice of the fact, in their answer, that the claimants might appear, if they saw cause, and maintain their right to the money. This was done; and on their examination, the claimants exhibited such proof of their interest in the property insured, and in the policy, that the defendants were discharged from the trustee process, and released from their liability as the trustees of Clapp, and could pay over the money to the plaintiffs with safety to themselves. In their conduct in this respect, they appear faithfully to have discharged the duty imposed upon them, with due diligence and a just regard to the rights of the contending parties; and as the fund was locked up before it became payable, they were in no default in not paying over the money at the call of the plain-

tiffs. Not being in default then, are they accountable for interest during such detention? The cases, which have been cited directly to this point, are so far contradictory as to leave the question, to some extent, unsettled. The cases especially relied upon by the plaintiffs are *Hunter v. Spotswood*, 1 Wash. 145; *Tazewell v. Barrett*, 4 Hen. & Munf. 259; and *Templeman v. Fauntleroy*, 3 Rand. 434. And on the other side, the case of *Fitzgerald v. Caldwell*, 2 Dall. 215, and 1 Yeates, 274, is believed to be directly in point.

In the three Virginia cases there is the charge of negligence and neglect of duty resting upon the garnishee, which probably led to the decisions in those cases; while in the case decided in Pennsylvania, those elements are excluded; although, if they had existed in that case, the court would have charged the garnishee with interest.

Two cases were cited from our own reports: *Prescott v. Parker*, 4 Mass. 170, and *Adams v. Cordis*, 8 Pick. 266. In the first of these, a judgment debtor was summoned as the trustee of the judgment creditor; and the court, in delivering their opinion, say, "It is admitted that the judgment has been satisfied, unless Parker is liable by law to pay interest on the judgment until it was satisfied. Interest is allowed in an action of debt or judgment, as the measure of damages for unjustly detaining the debt. In this case, he was obliged by law to detain the debt from Gilson; and therefore he cannot be answerable to the attaching creditor for damages for the detention." In the case of *Adams v. Cordis*, the defendant had been summoned as the trustee of the principal debtor, and on his disclosure it appeared that the demand against him was one which bore an accruing interest at the time; and the court decreed that the trustee should pay the interest as well as the principal during the detention of the fund, on the ground that the attachment of the debt carries with it the interest. And this distinction is taken between cases in which interest is given by way of damages, and those in which it constitutes a part of the debt; as it does in contracts in which there is a promise to pay interest. In the former class, it is obvious that when one is summoned as trustee, he is in no fault for not paying, and as he made no express agreement to pay interest, he ought not to be charged

with it. In the latter, the interest is the debt as much as the principal, and he ought to pay it. This distinction we believe to be a just one; and the question now is, under which class the present action ranges. The plaintiffs' counsel have argued that the contract of the defendants contains within itself a promise to pay interest, and that it might be declared upon as a contract in which the party stipulates to pay interest after the same becomes due; on the ground that this is the legal effect of the contract. But we do not sustain this view. We think that such a declaration would not describe the contract. Interest is not an integral part of such contract, but is given by way of damages for the non-performance of the contract. For in matters of property, the usual rate of interest has long been established as a just rule for the measure of damages in cases where the plaintiff has sustained an injury by the non-performance of a contract by the defendant.

The policy before us has been likened, in argument, to a note payable at a given time, with interest after. But on this policy, the money is not payable at any given time. The amount to be paid, and the time when, are both uncertain. The amount of the loss is payable after proof of loss, and a consequent notice and demand of the defendants. In the case of bank bills, which are but the promissory notes of a corporation, payable on demand, the court say, in *Suffolk Bank v. Worcester Bank*, 5 Pick. 109, "The bank bills or notes sued were promises to pay money on demand, without any engagement to pay interest. Interest was no part of the contract; but after demand and nonpayment, interest would be recovered in the form of damages for detention." And so in the present action. Till within a few years, interest has not been allowed on policies of insurance. It was a matter within the discretion of a jury. And the rule now followed in England, as stated by Lord Tenterden, in *Bain v. Case*, 3 Car. & P. 498, is this: "The assured cannot recover interest, unless he has made application to the insurer to pay the amount of the loss, and has notified him of the ground of such his application." This is similar to the rule adopted here; yet the contract itself, in this particular, has undergone no change since courts decided that interest was not recoverable. The contract of insurance is, as has often been

observed, a contract of indemnity. It is no engagement to pay a given sum, but an amount not exceeding a given sum, on the happening of certain perils; and certain duties must be performed by the plaintiff, before he can maintain his suit. We therefore think there was no express promise to pay interest.

It has been contended that the defendants mingled the funds of the plaintiffs with their own, and that they are therefore chargeable with interest. But while cases of that description furnish an argument bearing on the present, they are in themselves different, and the reasons why interest is allowed rest upon other grounds. Executors, guardians, and trustees, are intrusted with the property of others, and when they mingle the funds thus intrusted to them with their own they are chargeable with interest in equity, not because they have contracted to pay it in such an event, but as a penalty for violation of duty, and as a suitable remedy for those whose property is thus made liable to loss.

But it is also alleged as a reason why these defendants should pay interest, that they are stakeholders, and should have deposited the plaintiffs' money, and not have exposed it to the hazard of their own trade, and that it was not sufficient to have a balance in the bank usually large enough to meet the plaintiffs' demand. A stakeholder is one who has received the funds of another, or others, in special deposit for a given purpose, to be paid to one party, or divided between both or among all the parties, on the happening or not happening of some anticipated event, of which the stakeholder is often the judge, and such property he is bound to hold separately from his other funds. But the present is not the case of a stakeholder, and it merely assumes the likeness in consequence of the contention of creditors for the fund, a fact having no connection with the original contract.

In regard to making a deposit of the money in cases like the present, we know of no law or usage which requires it, nor any practice for bringing the same into court. Besides, would a deposit of this money in one of the banks of the city have protected the defendants in case of loss on the part of the bank? If the money were specially deposited for safe keeping, the bank in which the same is deposited would not be responsible,

except for gross negligence. And it has been held that it would not even be responsible for the frauds of its own officers. *Foster v. Essex Bank*, 17 Mass. 479. And if not specially deposited, then the party would have only the credit of the bank, which the party had in this case, by the promise of the bank to answer the defendants' check, at any time, to an amount equal to the plaintiffs' demand. If the funds in the one case had been stolen, or the bank had failed in the other, the defendants

- would still be liable, and they and not the plaintiffs would have a claim upon the bank.

Under these circumstances we think the defendants are not chargeable with interest. They were always ready to pay the demand, and did pay as soon as the plaintiffs had acquired a legal right to receive it, as ascertained by the competent tribunal.

We are aware that in the case of *Adams v. Cordis*, the fact that the defendant used the money, for which he was chargeable as trustee, in common with his other funds, during the pendency of the process, was mentioned as a reason why the plaintiff should recover interest. But without deciding, in this case, how far the use of the money may be a ground for charging trustees with interest, we think the main reason upon which the decision in that case rests is, that the debt was one drawing interest, and that the payment of accruing interest was as much a part of the contract as the payment of the principal.

But it is said that the refusal to allow interest on money in the hands of persons summoned as trustees will lead to collusion, and to unreasonable delay and negligence in making their answers, for the purpose of obtaining a longer use of the money. In answer to this suggestion, it may be stated that the court incline to the opinion that should such a case arise, it would form an exception to the rule adopted in the decision of this case, and that on proof of such facts the party would be chargeable with interest on the funds in his hands.

As to the principle contended for, that the plaintiffs lost the use of their money and the defendants enjoyed it, and that they should therefore be charged with interest because the plaintiffs have the better equity, it may be said that the plaintiffs did not give the defendants notice as soon as they acquired an interest

Valuation by Company. — Insurance above three fourths Value.

in the policy, and that if they had done so the trustee process might not have been prosecuted. But waiving such a consideration, both parties were subjected to inconvenience; the one from the detention of their demand, and the other from being compelled to employ counsel, attend court, and make answers under oath to various interrogatories, with a liability to be removed from court to court. If the contract had carried interest on the face of it, the plaintiffs would have the advantage of it; but as it did not, the defendants may, under the circumstances of this case, avail themselves of the fact that they have not violated their contract by wrongfully or unreasonably detaining the plaintiffs' money, and so are not chargeable with interest.

Plaintiffs nonsuit.

ALEXANDER FULLER vs. THE BOSTON MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1842.)

Valuation by Company. — Insurance above three fourths Value.

Valuation of the premises insured, deliberately made by mutual agreement between the parties to the contract of insurance, is, in the absence of fraud, collusion, or misrepresentation, to be taken as the best evidence of the actual value of the premises.

THE case is sufficiently stated in the opinion of the court.

Goodrich & Barrett, for the plaintiff.

C. P. Curtis, for the defendants.

SHAW, C. J. Assumpsit on a policy of insurance against fire, in which the plaintiff relies upon the original cause of action, and also on award. The plaintiff sues, in effect, as assignee, but as the assignment was made with the consent of the defendants and as a part of the original contract, and as it is found that the plaintiff was interested, as mortgagee, to the amount of the whole sum insured, we see no reason why he cannot maintain the action in his own name, and his right to do so has not been contested on that ground.²

Several questions have been argued; one of them, and a prin-

¹ 4 Met. 206.

² See post, p. 190.

cial one, is, whether the valuation of the property as stated in the policy, under the circumstances, is to be deemed conclusive evidence of the actual value for the purpose of adjusting the loss.

It is not contended that there was any designed or fraudulent over-valuation, or any collusive valuation, or any wilful misrepresentation of the value. The case arises upon a policy made by a mutual insurance company, that had no authority to insure over three fourths of the value of the buildings. In regard to all property lying out of the city of Boston, the mode taken to ascertain the value was this: the assured made a statement in writing, in answer to certain standing questions, in compliance with the by laws of the company, of the situation, circumstances, and value of the buildings proposed to be insured, which was filed and remained with the company. By the seventh article of the by-laws, it would be the duty of the president to visit and examine the buildings, alone or jointly with a director, and to fix the sum to be taken thereon, and the rates of insurance. As this company was established at Boston, it was to be expected that the greater proportion of risks would be taken in Boston, and the by-laws were adapted to meet that expected state of things, but they made no special provision for examining buildings outside of the city. But this indicates the general policy of the company, and, in point of fact, it appears, in the present case, that a like examination was made by a committee of the directors, and for the like purpose.

In determining what amount shall be insured, the company necessarily determine the value of the building, or rather they fix a valuation over which it shall not be rated for the purpose of insurance. Being limited to insure not exceeding three fourths of the value, in determining the sum to be insured, they by necessary consequence fix a valuation at such a sum that the sum insured shall not exceed three fourths of it. The result is, that as the valuation is thus proposed on the one side, and after the proposition is considered and modified it is acceded to on the other, and the amount insured, and the rate of premium, assessment, and liability, established on the same basis, it is, in the highest sense, a valuation by mutual agreement.

Then the question is, whether a valuation thus deliberately and carefully made by mutual agreement, as a part of the original negotiation — when each party is independent of the other, and at liberty to contract or not, as they are or are not respectively satisfied with the terms — shall, in the absence of all fraud, collusion, and misrepresentation, be taken as the best evidence of the actual value of the premises insured. See *Borden v. Hingham Mutual Fire Ins. Co.* 18 Pick. 523.

The same reason, which applies to other cases of contract, applies to this ; and the general rule is, that parties capable of contracting, and who enter into a contract, without fraud or imposition, are bound by law to abide by it.

One of the principal objections is, that the defendants are a corporation, and that a corporation can only act within the scope of the authority conferred upon them ; and that by their act of incorporation, this company can only insure three fourths of the value of the property ; and if they can show that a contract in its terms proposes to bind them to a responsibility for a greater amount, they may show it in defence, and reduce the amount to that, for which alone they can make themselves liable. This, as I understand it, is the strength of the argument. But, admitting its full force, we think it does not shake the position, that a valuation, fairly and deliberately made, is binding on them. The defendants were incorporated for the express and indeed for the sole purpose of insuring each other against loss by fire. Like all trading or negotiating corporations, being invested with power to make a particular class of contracts, they are invested with all the incidental powers necessary to carry into effect the objects and purposes for which the corporation was created. In giving them power to insure a certain proportion of the value of the buildings, the legislature necessarily clothed them with the power, at some time and in some mode, to determine such value, or enter into suitable and proper arrangements for fixing it. Whether this shall be done by their own officers, or by referees mutually agreed on ; whether before or after the contract entered into ; is a question of expediency, not of power. If they had not power, in some mode, to fix the value, they never could make an adjustment which might not be overreached by a suit, in which the question of value must be

submitted to a jury. Such valuation by the appraisement of indifferent men, or such adjustment after a loss, would always be open to the same objection as this valuation; which is, that though the officers of the corporation have assented to the valuation, yet if it is an over-valuation, or if, in other words, it can be shown, to the satisfaction of a jury, to be an over-valuation, it is void as against the corporation. But we think the true answer is this: that a valuation deliberately and honestly fixed by agreement, a valuation by which the premium and assessments to be paid by the assured are fixed, as well as the amount to be paid by the company in case of loss, is the best evidence of the actual value. Suppose a claim on a policy for a loss, and that the company might perhaps have successfully defended, on the ground that the loss was one for which they were not liable — as by fire caused by civil war, or insurrection — and the parties should agree to an adjustment by compromise or arbitration. Such adjustment would, we think, be binding; and yet its binding force would be derived wholly from the agreement. It being once admitted that they are a body having the faculty to contract, we think it follows, that they have the power, by their regular agents and officers, to make all such subsidiary and incidental contracts and agreements, both in making the principal contract, and afterwards in adjusting and executing it, as are necessary to accomplish the main purpose and object of their incorporation. Being of opinion, that the valuation, under the circumstances, was conclusive, it becomes unnecessary to consider the other branch of the case, or the effect of the award. The fact, that the present plaintiff was no party to the submission, would seem to be a formidable objection to his recovering upon it; but for the reason stated, we give no opinion on that point, and only make this remark, to show that we place no reliance on that award in rendering

Judgment for the plaintiff.

See *Cumberland Valley Mut. Ins. Co. v.* 211, *post*; *Trull v. Roxbury Mut. Fire Ins. Schell*, 29 Penn. St. 31 (1857); *Holmes v. Charlestown Mut. Fire Ins. Co.* 10 Met. Co. 3 Cush. 263, *post*.

Action. — Residence. — Plea in Abatement.

FEDERAL BOYNTON & another vs. THE MIDDLESEX MUTUAL
FIRE INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1842.)

Action. — Residence. — Plea in Abatement.

The declaration in a suit in Suffolk county upon a fire insurance policy described one of the plaintiffs as of Middlesex, and the other as of Suffolk county. The defendants pleaded in abatement that they were a corporation established by law, that their place of business was in Middlesex county, and that the plaintiffs' cause of action accrued to them, if at all, as members of the company in Middlesex county, and that their suit should have been brought there. The plea was held bad, under the statute.

THE case is stated in the opinion of the court.

H. H. Fuller, for the plaintiffs.

J. Keyes, for the defendants.

SHAW, C. J. This action is brought upon a fire insurance policy in the name of two plaintiffs, one of whom is described to be of Cambridge in the county of Middlesex, and the other of Boston in this county. By the general rule of law, fixing the county in which actions are to be brought, and requiring them to be brought in the county where one of the parties lives, it is provided that if either of the parties consists of two or more persons, living in different counties, the action may be brought, so far as it depends upon their place of residence, in the county where either of such persons lives. Rev. Sts. c. 90, § 15. So far as the residence of the present plaintiffs is concerned, therefore, the action is well brought in this county.

The defendants plead in abatement to the jurisdiction of the court in this county, that they are a corporation established by law, that their place of business is in Concord, in the county of Middlesex, that they have no place of business in this county, and that the plaintiffs' cause of action, if any, accrued to them as members of said company and in said county; and that they ought to have brought their action to the court of common pleas in Middlesex, and not in this, &c. To this plea the defendants have demurred, and the plaintiffs have joined in demurrer.

It seems to us very clear that under the general law this plea

¹ 4 Met. 212.

cannot be sustained. The statute provides that when any corporation (other than a county, town, parish, or school district, is a party — corporations, it is obvious, which are strictly local), the action may be brought in any county in which such corporation shall have an established and usual place of business; or if the other party is a natural person, the action may be brought in the county where such person lives. Rev. Sts. c. 90, § 16. It appearing from the plea that this is a corporation, other than a town, &c., and has an established place of business in Concord, and that the other party are natural persons, one of whom lives in this county, it is obvious that by the rule cited, the action might be brought in the county of Suffolk or Middlesex.

The defendants then refer us to their act of incorporation, as prescribing a different rule in regard to this particular corporation, founded upon the consideration that its leading object was to insure property in the county of Middlesex, and that as a corporation for mutual insurance, each person insured is *de facto* a member of the corporation. St. 1825, c. 141. By the Rev. Sts. c. 2, § 3, all acts of incorporation are deemed public acts, and may be declared on and given in evidence, without specially pleading the same. We therefore give the same effect to all the provisions of the act incorporating the defendants (St. 1825, c. 141) as if it were a general law. In applying this statute to the case, some reliance may be placed on the clause in § 2, that each person insured should be deemed and taken to be a member of the corporation, and be at all times concluded and bound by the provisions of the act. But we think they would be bound by it as effectually without this express provision as by force of it.

But the defendants rely mainly upon the provisions of §§ 7, 8, and 11, which direct how losses shall be demanded, adjusted, and recovered. The 7th section provides that if a loss demanded is not settled by the directors by adjustment or reference, the party suffering may bring his action at the first court in the county of Middlesex competent to try the same, with a special provision as to costs, and with a further provision that upon judgment against the company, execution shall not issue until after three months. Sections 8 and 11 provide for the

assessment of the money upon the members, and for the payment by the directors.

Upon this view of the law, the defendants contend that the plaintiffs have shown no cause of action; and they rely upon the well known rule that where the law has provided a particular remedy in a new case, the party seeking a redress is confined to that specific remedy, and has no general remedy at common law. We think this maxim a sound one, and applicable to the present case. The members are incorporated for the purpose of insuring each other to a limited amount, and in a peculiar manner, specified in the act of incorporation. They have no large subsisting capital, like other insurance companies and other corporations. They have, from premiums, a small available capital for current expenses and small losses, and a power to raise money from the deposit notes of the members and from assessments, to meet and satisfy larger claims. It seems fit, therefore, that special remedies, adapted to such a state of the liabilities of the association, should be prescribed, and that those entitled should be restrained to the remedies given by their policies, modified and controlled by the act under which they were made.

But this rule must be limited to the cases for which the special remedies are provided. If no special remedy has been provided, the party holding a policy of insurance would have had his remedy under the general law regulating contracts, and affording remedies for breaches of them. It follows of course, that when the law has provided a special remedy for some cases and not for others, under the same contract, the party must pursue his special remedy as far as it is provided, and will be remitted to the general law for a remedy in other cases.

The special remedy is provided for a case where, on notice, the directors have proceeded to ascertain and determine the amount of loss, and the assured is not satisfied with that determination. He is then to bring his action to the next court in the county of Middlesex to which such action may be brought, and having jurisdiction of actions of similar nature and amount. There is much reason for this promptness. The object seems to be that if the amount is increased by the judgment in such action, it may be assessed upon and borne by those then liable;

whereas, without such provision it might be brought at any time within the statute of limitations, after great changes had taken place amongst the parties liable for the loss.

Besides, the matter to be tried in such case is, not whether the company is liable for anything, but whether the amount fixed by the directors is sufficient. The costs are to follow, on the decision of this question. It is in the nature of an appeal to a court and jury from the decision of the directors, on the question of the amount of damages.

It then becomes necessary to inquire whether there are not cases in which this special remedy will not apply.

The first act to be done after a loss is for the assured to give notice in writing, within thirty days. It is then made the duty of the directors, upon view of the premises, or in such other way as they may deem proper, to ascertain the amount of said loss or damage. If no dissatisfaction is expressed by the assured, the directors, by § 7, have three months within which to pay the amount of the loss in money, or rebuild the premises, or repair the damage. And unless such dissatisfaction and an action brought pursuant to the mode in § 7, the determination of the directors must be taken to be conclusive.

But the directors may neglect or refuse to ascertain and determine the loss, or what will probably much more frequently happen, they may come to a determination that the loss is one for which the company are not liable; either because the contract was obtained by fraud or misrepresentation, because the assured had no insurable interest, or the loss was caused by the assured himself, or by popular insurrection, or other excepted risk, or that the premises were previously insured in some other office, or that the buildings had been so altered after the insurance and before the fire, as to increase the risk. In any of these cases, the directors could not proceed to ascertain the amount of loss; it would be a duty which they owe the company, to resist the claim altogether. But such determination would not be binding upon the assured, and he must have his remedy. He could not have the special remedy provided in the act. He must therefore have a remedy under the general law. And we think that in such case the corporation would be put upon the same footing as if a special remedy for another case, by action

in the county of Middlesex, had not been provided; and that the action may be brought in the county where the plaintiffs or either of them reside. This seems alike conformable to the provisions of this act, and to the equitable considerations which may be presumed to have governed the legislature in making them. If the plaintiffs' entire right to recover is denied, and as it may be upon grounds implicating the honesty and fair dealing of the assured, it seems reasonable to allow him the privilege granted by the law in most similar cases, to choose his forum. But if the right is conceded, and it is a mere question as to amount, a suit promptly brought and tried in the vicinity would seem to be all that is required to secure to the assured the indemnity promised by the policy.

Upon this view of the law, as there are many cases in which the court in this county would have jurisdiction of actions against this corporation, notwithstanding the fact pleaded, that they are established and have their place of business at Concord, in the county of Middlesex, the court are of opinion that that fact is not sufficient to oust the court of common pleas in this county of its jurisdiction, and therefore that there must be judgment of *respondeat ouster*.

At the same time it is proper to say, what indeed results from the foregoing view, that in order to maintain a general action on this policy, it will be necessary to aver and prove that the plaintiffs gave notice in writing in thirty days, and that the directors neglected or refused to determine and ascertain their loss, or refused to allow or pay any loss; or in other words, to show that the plaintiffs pursued their special remedy, until they were prevented from reaping the fruits of it by the act or neglect of the company, in order to show their right to recover on the general law, and of course to maintain an action in this county. Supposing this to be necessary, we are strongly inclined to think that the declaration, as it stands, would be bad on demurrer, for want of such an averment. But as this will be open to an amendment, we give no opinion on that question.

PENTZ & others vs. THE RECEIVERS OF THE ÆTNA FIRE INSURANCE COMPANY.¹

(Court of Chancery, New York, April, 1842.)

Destruction of Premises to stop Fire. — Damages. — Estoppel.

Where insured premises and goods were destroyed under orders by the municipal authorities to stop the course of a fire, and the owners obtained a judgment in damages against the corporation less in amount than the sum insured, *held*, that the insurers were liable for the residue.

APPEAL from a decision of the vice-chancellor.² The premises and goods in question had been destroyed by the city authorities of New York to stop the spread of the great fire in 1835. The owners thereafter obtained a judgment against the city, in which the jury assessed the value of the property at a sum below the amount of insurance which had been granted upon the property by the defendants.

In the court below, this verdict of the jury had been held conclusive of the amount of loss sustained by the insured, and their right to resort to the insurers for the balance of their alleged claim had been denied.

D. Lord, Jun., for the appellants.

J. W. Gerard, for the respondents.

THE CHANCELLOR. I think the vice-chancellor erred in supposing the verdict of the jury upon the assessment was conclusive evidence between these parties, as to the actual amount of the loss which the petitioners had sustained. As between the petitioners and the city corporation it was conclusive. And as the insurance company could have no claim against the city of New York except through the petitioners, and as being subrogated to their rights, it would be conclusive as between the corporation and that company. But the decision of the supreme court in the case of *The City Fire Insurance Co. v. Corlies*, 21 Wend. Rep. 367, shows that the insurers were liable to the assured to the extent of their policies, notwithstanding the blowing up of the buildings. The application for an assessment against the corporation was, therefore, for the benefit of

¹ 9 Paige, 568.² 3 Edw. Ch. 341.

the insurers to the extent of the insurance, and for the benefit of the petitioners for the residue of the loss. And if the jury, without any fault on the part of the assured, should refuse to give the whole amount of the loss, either because they thought some part of the property would undoubtedly have been destroyed by the fire if the buildings had not been blown up, or for any other cause, there is no principle which can make that decision conclusive as to the actual extent of the loss as between the insurer and the assured. The fact that a part of the property would unquestionably have been lost by the fire if the buildings had not been blown up, would be a good reason for not including that amount in the assessment against the city. But it would be no reason for excusing the insurers from bearing their proportion of that loss which was covered by the policy.

Again, the proceedings against the corporation being for the benefit of the insurers as well as of the assured, the latter were entitled to a deduction from the amount recovered from the city corporation on account of the necessary costs and expenses of litigating that assessment through all the courts, and the loss of interest, if any, which had been sustained without any fault on the part of the petitioners.

The claim against the underwriters must therefore be adjusted by ascertaining the whole extent of the loss, at the cash value of the buildings and goods at the time of the destruction thereof, including the interest thereon until the time when the money was recovered under the assessment, and then deducting therefrom the amount received as the proceeds of the assessment, and charging the insurers with a proportionate share of the costs and counsel fees of that litigation in proportion to the benefit it was to them in limiting their liability under the policies. But in such a manner as in no event to charge the insurers with more than the amount of the two policies, and the interest thereon from the 25th of May, 1836, when the amount of the loss became due and payable by the underwriters. If the receivers and petitioners cannot agree upon an adjustment upon these principles, the referees must review their report and ascertain the amount due, and report the same to the vice-chancellor, to the end that a proper order may be made thereon

Damages. — Rents. — Profits

for the payment of the distributive share of the petitioners out of the funds in the hands of the receivers. No costs are allowed to either party on this appeal, and the proceedings are to be remitted to the vice-chancellor.

The decision in this case seems to rest on the familiar doctrine that a judgment *inter alios* is not an estoppel.

MICHAELA LEONARDA, Baroness of Pontalba *vs.* THE PHENIX ASSURANCE COMPANY OF LONDON.¹

(Supreme Court, Louisiana, April Term, 1842.)

Damages. — Rents. — Profits.

Under a policy of insurance on a house, with the condition that, in case of loss, the assured may either reinstate the building, or pay the amount of the loss as soon as proved, rent for the period occupied in rebuilding or repairing cannot be recovered as part of the indemnity due to the assured. Such rent formed a distinct insurable interest.

The general principle that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing, or might have drawn from the thing insured.

APPEAL from a judgment of the parish court of New Orleans, Maurian, J., in favor of the defendants.

This case was submitted, without argument, by *Buisson*, for the appellant, and *L. C. Duncan*, for the defendants.

MORPHY, J. Certain stores and buildings, insured against fire, having been partially destroyed, were rebuilt, or rather repaired, by the defendants, under a clause in the policy worded as follows: "When any loss shall have been sustained by fire upon property insured, the company will either reinstate the same, or the assured, as soon as such loss or damage shall have been duly proved, shall immediately receive payment of his claim." This suit is brought to recover \$1,200, for the rent of the stores during three months that the rebuilding or repairing of them lasted. The question is, whether, under the above recited clause in the policy, the defendants are bound to pay

¹ 2 Robinson, 131.

the rent of the property during the time that was occupied in reinstating it. There is no dispute as to the value of the rent, nor as to the necessary duration of the repairs made to the premises. In the absence of an express stipulation, such as appears to exist in the policies of several insurance companies of this city, that during the rebuilding or repairing of a house, rent shall be paid as a part of the indemnity due to the assured, it cannot be contended, on any legal principle of insurance, that a policy on a house covers any part of the rent, which is a thing distinct from the subject matter of the insurance, and constituting of itself an insurable interest. The obligation of the defendants to the assured could be discharged, either by the payment of the amount of the loss or damage sustained, or by reinstating the property in its former condition. The latter alternative necessarily implied some reasonable time for its execution. Of this the insured was aware. No rent having been stipulated for during that time, none can be exacted. The testimony shows that the amount for which the repairs could have been made was tendered to the plaintiff's agent, but that he refused to receive it, thus throwing on the defendants the obligation of repairing the house. By doing this, he could not surely impose upon them the additional obligation of paying the rent during the repairs. This rent was no part of the thing insured. If the plaintiff wished to secure its amount during the rebuilding of her stores, whether done by herself or by the defendants, she should have made an express stipulation to that effect, or have caused a separate insurance to be made on it. But it is urged, in support of the present claim, that a policy of insurance being a contract of indemnity, the underwriters are bound to adjust the loss upon the principle of replacing the party assured, as nearly as may be, in the situation he was in before the fire. This is unquestionably true as a general principle, and in relation to the subject matter insured, but it has never been understood to extend to the profits or fruits the assured was drawing, or might have drawn, from the thing insured. These are consequential losses, for which he cannot be indemnified, especially when such losses fall on things susceptible of being insured separately. There is much analogy between the rent of a house and the freight of a ship; both are the civil fruits of the

Assignment. — Suit by Assignee.

thing from which they are derived. It is believed that the attempt has never been made to recover freight under a policy of insurance on a vessel; and yet the loss of the freight, like that of the rent, is a direct consequence of the destruction of the vessel. In both cases the loss falls on a thing which is no part of the object insured, and which is not, therefore, covered by the policy. 1 Phillips on Insurance, 190; 2 Marshall on Insurance, 722.

Judgment affirmed.

JESSEL vs. THE WILLIAMSBURG INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1842.)

Assignment. — Suit by Assignee.

The assignee of an insurance policy, though assigned with the consent of the insurers, cannot maintain a suit in his own name upon the policy; he can only sue in the name of the assignor.

ERROR to the superior court of the city of New York. Jessel sued the defendants in assumpsit, on a policy of insurance entered into by them, wherein they engaged to insure one Charles E. Sheward against loss by fire for one year, upon certain property in which the latter had an interest. The policy bore date July 26th, 1838, and the property was destroyed by fire on the 24th of January, 1839. The following clause was contained in the policy: "The interest of the insured in this policy is not assignable unless by the consent of this corporation (the defendants) manifested in writing. And in case of any transfer or termination of the interest of the insured either by sale or otherwise without such consent, this policy shall from thenceforth be void and of no effect." On the 16th of October, 1838, the defendants gave their written consent that the policy might be assigned to Jessel, the plaintiff; and on the same day Sheward assigned it accordingly. Among other objections urged by the defendants against the right of recovery claimed, they insisted that the action would not lie in the name of Jessel, but should have been brought in the name of Shew-

¹ 3 Hill, 88.

ard, the assignor. The court below sustained the objection and nonsuited the plaintiff, who excepted, and after judgment sued out a writ of error.

C. O' Connor, for the plaintiff in error.

W. C. Noyes, for the defendant in error.

Per CURIAM. We know of no principle upon which the assignee of a policy can be allowed to sue upon it in his own name. The general rule applicable to personal contracts is, that if assigned, the action for a breach must be brought in the name of the assignor, except where the defendant has expressly promised the assignee to respond to him. *Compton v. Jones*, 4 Cowen 13; 1 Chitty's Plead. 9, 10; *Innes v. Dunlop*, 8 Term Rep. 595; *Currier v. Hodgdon*, 3 New Hamp. R. 82; *Wiggin v. Damrell*, 4 Id. 69; *Skinner v. Somes*, 14 Mass. Rep. 107; *Mowry v. Todd*, 12 Id. 281; *Crocker v. Whitney*, 10 Id. 316; *Dubois v. Doubleday*, 9 Wend. 317; and see Chit. on Contr. 614, note 1, 5th Am. ed. In *Granger v. The Howard Insurance Company*, 5 Wend. 200, 202, the point now raised was discussed, and, we think, decided against the present plaintiff. The argument that the policy in question originally contemplated an assignment, would be equally cogent in all cases, for aught we see, of a promise in form to one and his assigns; and yet it is settled that the latter words do not impart a negotiable quality to the promise so as to enable the assignee to sue upon it in his own name. *Skinner v. Somes*, 14 Mass. R. 107, 108.

The judgment below is clearly right, and should not be disturbed.

Judgment affirmed.

In *Fuller v. Boston Mutual Fire Ins. Co.*, as mortgagee to the amount of the sum *ante*, p. 177, the plaintiff sued as assignee, insured, no reason was seen why he could not sue in his own name. The words in italics must furnish the distinction between the cases, if there be any.

the company, and as part of the original contract, and as the plaintiff was interested

WILLIAM WEBB LYON & another vs. THE COMMERCIAL INSURANCE COMPANY.¹

(Supreme Court, Louisiana, May Term, 1842.)

Duty of Disclosure. — Tenants. — Manner of Occupation. — Gambling Establishments. — Court and Jury.

The owner or tenant of a house, insuring against fire, is not bound to disclose or communicate to the insurers the names or pursuits of sub-tenants living on the premises. If the insurers wish to guard against the risk from certain pursuits or occupations of tenants or sub-tenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial to the risk, must be complied with, before any action can be maintained on the policy.

The owner of a house which has been insured has a right to have it occupied by any one he pleases, provided the occupations of such persons, or the property placed in the house, is not of a nature to vitiate the policy under the conditions relative to hazardous or extra hazardous risks.

Where a stock of goods in a house is insured, the manner in which the rest of the building is occupied cannot affect the policy, unless some warranty has been made in relation thereto, or there has been a concealment or misrepresentation of facts deemed by the jury material to the risk.

Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the neighborhood of gambling establishments, and the applicant knew at the time that there was such an establishment within the premises in which the property was insured, it is for the jury to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk, as to vitiate the policy. It is of no consequence whether it was considered material to the risk by the insurers; it must be considered so by the jury.

Where a fact, not provided for by a warranty on the face of the policy, is concealed, it cannot affect the right to recover, unless material to the risk, when it avoids the policy on the ground of fraud, or of its having misled the insurers; and in all such cases the materiality of the facts concealed or misrepresented must be left to the jury, who are the proper judges whether the risk has been thereby increased.

APPEAL from the commercial court of New Orleans, Watts, J.

MORPHY, J. The plaintiffs seek to recover \$15,000, on a policy of insurance against fire on their stock in trade, consisting of clothing, hats, &c., in a store, No 11, Front Levée Street. The insurance was effected for one year from the 9th of December, 1839, and the goods insured were destroyed by fire on the morning of the 27th of March, 1840. The defence set up to this claim is in substance, that before, at the time of, and after the execution of the policy, the plaintiffs withheld from the company important information material to the risk. The facts alleged to have been concealed were the names and

¹ 2 Robinson, 266.

occupations of the tenants on the premises; and it is averred that the risks of the defendants were greatly increased by such concealment, because the pursuits and occupations of the tenants were of a nature to endanger the safety of the premises. This case was tried by a jury, who rendered their verdict in favor of the plaintiffs. The company appealed, after an ineffectual attempt to obtain a new trial.

Durant & Grymes, for the plaintiffs.

Lucius C. Duncan & Isaac T. Preston, for the appellants.

MORPHY, J. There was a concealment of material facts which greatly increased the risk, and which would have prevented the contract had they been known to the defendants. The omission to state material circumstances, though the result of accident or neglect, will vitiate the policy. *A fortiori*, where any suppression or misrepresentation has proceeded from a fraudulent purpose. *Ellis on Fire Ins.* 23; *Ratcliffe v. Shoolbred*, 1 Park, 270, 7th ed.; *Carter v. Boehm*, 3 Burr. 1905. See 2 Park on Insur. 99, 100, and 2 Peters, 49, 50, as to the facts which the assured is bound to disclose.

On the merits, there is no dispute as to the value of the goods destroyed, and no charge of fraud is set up against the plaintiffs. The only defence is, that the assured, who rented the second story of the building they occupied to one Cornell, and knew that he kept in it a gambling establishment, did not communicate the fact to the defendants; and that such concealment was material, as the fact concealed greatly increased the risk, and would have prevented them from insuring had it been made known. The evidence shows that the building in which the goods insured were stored was four stories high, and belonged to one Kohn, and that the plaintiffs had a lease of it for a term of years; that they never occupied the whole of the premises themselves, but sub-leased from time to time the second and fourth stories; that the fourth story, which had been let to a militia company some time before, was unoccupied at the time of the fire, but that the second story was then occupied by one Cornell. The testimony leaves little doubt in our minds that this tenant kept a gambling-house in the rooms he rented from the plaintiffs, and, moreover, renders it probable that the plaintiffs knew the fact. Armstrong, the secretary of the com-

pany, testifies that when application was made for insurance, he went with the plaintiffs to take a general view of the premises; that in a conversation he then had with Lyons, in relation to the gambling establishments in the neighborhood, he stated the objection he should have to taking risks near these establishments. This witness thinks that Lyons replied, that he did not know there were any such there, and that if there were, it would most likely be in the corner store; and that he then remarked to Lyons that there was an intervening store; that he knew the stores to be well built, and that he would, therefore, take the risk; that plaintiff at the time gave no intimation that he had under-leased any part of the premises, or that he had the intention to do so; that had he (the witness) been informed at the time that there were sub-tenants on the premises, he would, before taking the risk, have made inquiry to ascertain the occupations and business of the sub-tenants, &c. On the trial of the case, the counsel for the underwriters requested the court to charge the jury that, if they believed that the plaintiffs were tenants by the year of the store in which the property insured was, they (the plaintiffs) were bound to inform the company if there were any sub-tenants in the premises, and who they were. The court refused so to charge the jury, but on the contrary, instructed them that the plaintiffs were not bound to inform the defendants if there were any sub-tenants, nor what their occupations were, the more especially as the insurance was not on the store, but on a stock of goods in it; and that if the jury believed that, pending the negotiation for the policy, the defendants, through their agents, had objected or expressed an unwillingness to insure property in the neighborhood of gambling establishments, and that the plaintiffs at the time knew that there was one within the premises in which was the property insured, the court would leave it to them to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk, as to vitiate the policy, and that it was of no consequence whether it was material in the opinion of the defendants or their agent, but that it must be considered material to the risk by the jury themselves. The judge further instructed the jury that, where a house was insured, the owner of the house had a right to have it occupied by any person he pleased, provided the occupations of the persons, or the property

in it, were not of such a nature as to vitiate the policy under the conditions relative to what was considered hazardous or extra hazardous risks; that where a stock of goods, which were in a part of a house or store, were insured, the manner in which the rest of the house was occupied did not affect the policy, unless the insured had made some warranty in relation thereto, or unless there had been a concealment or misrepresentation of facts deemed by the jury material to the risk. To this charge of the judge, and to his refusal to instruct the jury as prayed for, the defendants took a bill of exceptions.

The charge of the judge appears to us substantially correct.

No case, it is believed, can be referred to, in which it has been held that the owner of a house, or a tenant on a lease for years, is bound to disclose or communicate to his underwriters the names and pursuits of the tenants or sub-tenants, living on the premises. If the insurers wish to guard themselves against the risk or dangers supposed to result from certain pursuits or occupations of the tenants, or sub-tenants, of houses on which they make insurance, whether it be on the property itself, or on goods in it, they have it in their power to insert in the policy a warranty to that effect. Being considered as a condition precedent, a warranty, whether material or immaterial to the risk must be complied with, before the assured can maintain an action on the policy; but where a fact, not provided for by the warranty appearing on the face of the policy, is concealed, it cannot affect the assured's right to recover, unless it be material to the risk, for then it avoids the policy on the ground of fraud, or because the underwriters have been misled. But, in all cases of this kind we take the rule to be well settled, that the materiality of the fact concealed or misrepresented is to be left to the jury. They are the proper judges of the fact whether the risk of fire has been thereby increased. 10 Pickering, 535; 2 Peters, 56; 7 Wend. 77; 6 Ib. 627; 1 Hall, 234, and note. In the present case the jury were called upon to decide whether the plaintiffs, at the time when the insurance was effected, knew that their tenant kept a gambling-house in the premises, and whether the danger of fire was thereby greatly enhanced. After hearing all the evidence, they decided these questions of fact in the negative; and we cannot say that they erred.

Judgment affirmed.

Double Insurance. — Transfer of Policies.

WILLIAM D. WALTON & another vs. THE LOUISIANA STATE MARINE AND FIRE INSURANCE COMPANY.¹

(Supreme Court, Louisiana, July, 1842.)

Double Insurance. — Transfer of Policies.

Plaintiffs, who were grocers, had two policies of insurance on their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment of their vendor, whose policy had been transferred to them with the consent of the defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to the insurers, and an indorsement on the policy of any other insurance elsewhere on the same stock on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances previously existing on their stock. The stock being injured by fire, in an action against defendants, *held*, that by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of the plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock, and that, having failed to do so, they could not recover.

THIS appeal having been dismissed in consequence of an omission of the clerk to transcribe the final judgment rendered below, a copy of that judgment was brought up, by consent, and the case submitted.

G. Strawbridge, for the plaintiffs, cited 4 La. 542; 6 Ib. 537; 12 Ib. 176; 4 Mason, 296; 7 Peters, 69.

L. Janin, contra, cited 3 Kent's Com. 374; *Harris v. Ohio Ins. Co.* 5 Hammond's Ohio Rep. 466.

MARTIN, J. The plaintiffs purchased the stock in trade of Lawrence, a grocer, in the stores Nos. 28 and 29 New Levée Street, which was insured in the Louisiana State Marine and Fire Insurance Company. His policy extended to his stock and consignments held in trust contained in the store. It was transferred to the plaintiffs with the assent of the company. At that time the plaintiffs had a grocery store, and a policy in the Merchants' Office, and another in the Firemen's Office, each for ten thousand dollars. The terms of these policies are literally the same as that of Lawrence. All these policies contained the usual clause that notice should be given to the

¹ 2 Robinson (La.), 563 (1842).

company, and be indorsed on the policy, of all insurances made with other companies on the goods insured, and that unless such a notice be given the insured shall not be entitled to recover.

Soon after the purchase the plaintiffs removed all the goods in their store to Nos. 28 and 29 New Levée Street, which now contained all the goods insured by them, and by Lawrence, their vendor.

A fire greatly damaged these goods. The injury was valued at \$7,564.22, and the object of the present suit is to recover one half of that sum, the other half having been paid by the two other companies. The plaintiffs had a verdict and judgment for \$1,500, and appealed, after an unsuccessful attempt to obtain a new trial. The defendants pray that the judgment may be reversed, and that ours be in their favor. The counsel for the defendants and appellees has urged that the plaintiffs and appellants cannot recover, because there was a double insurance upon the goods of which no notice was given. The plaintiffs' counsel contends, that the clause which requires notice of a double insurance is a penal one, and ought not to be extended by implication, and that it is the business of the defendants to show that the goods insured by them were insured by the plaintiffs in the office of another company. The defendants think that they have done so, by showing that those goods were mixed with others insured elsewhere. The counsel for the appellants asks whether, if the goods insured by the plaintiffs were sugar, and those insured by Lawrence were salt, it could be said that the policy on the salt was a policy on the sugar; and whether, supposing that the merchandise in the stores Nos. 28 and 29 had been insured in different offices, and the insured had taken down the partition wall and called the enlarged store No. 28, this circumstance would defeat both policies? He contends that it would not, because the objects insured by each office could be distinctly known, and the loss arising under the two policies easily ascertained. That a circumstance creating a difficulty in fixing the amount of loss chargeable to each is very different from a double insurance, and that the difficulty in the present case is chargeable to the defendants, their president having refused to join those of the two other companies in ascertaining the loss.

The record shows that on the removal of the goods from their store to Nos. 28 and 29 New Levée Street, the plaintiffs obtained from their insurers a transfer of the policies on the goods in their former store to the same goods in the stores Nos. 28 and 29. By consenting to the transfer of the policy of Lawrence to the plaintiffs, the defendants became the insurers of the stock in trade of the plaintiffs in Lawrence's former store, which now consisted of the goods purchased from Lawrence and those of the plaintiffs removed from their former establishment. There is no doubt, had the stock in trade of the plaintiffs been sugar, and that purchased from Lawrence salt, that both the sugar and salt would have constituted the plaintiffs' stock in trade, and that the defendants would have become the insurers of the whole stock, *id est* of the sugar and salt, to the extent of the amount insured, in the same manner as if the plaintiffs, without any purchase from Lawrence, had added a quantity of salt to the sugar which they had in their former store. The former stock in trade of the plaintiffs, and that of Lawrence from the time of the purchase, constituted the stock of the plaintiffs, on which they had an insurance in the office of the defendants for \$20,000, under the policy transferred by Lawrence with the consent of the defendants, and two other insurances in the Merchants' and Firemen's Insurance Offices for \$10,000 each. The plaintiffs were, therefore, bound to give notice that, independently of the insurance of the defendants' office, their stock in trade was insured elsewhere to an extent equal to that insured by the defendants. Their neglect to give that notice is properly pleaded in bar to their recovery. It is due to the judge of the commercial court to say that such was his opinion, expressed at full length in the reasons which he gave for refusing a new trial, in which he observed that the verdict ought to have been for the defendants, and was clearly a compromise between what was considered the law and the equity of the case. He thought it useless to send the case to another jury, as the facts were not disputed, and there was no contrariety of evidence, and as the whole case would be before us upon a mere question of law.

It is, therefore, ordered that the judgment be annulled, and that ours be for the defendants, with costs in both courts.

Insurance by Mortgagor. — Assignment to Mortgagee. — Sale of Premises.

In the Matter of the Petition of KIP, Trustee, &c. vs. THE RECEIVERS OF THE MUTUAL FIRE INSURANCE COMPANY.¹

(Vice-chancellor's Court, New York, July, 1842.)

Insurance by Mortgagor. — Assignment to Mortgagee. — Sale of Premises.

B., mortgagor of the premises, insured the same and assigned the policy to K., the mortgagee, as security for the mortgage debt. B. subsequently sold the property before the loss, and the purchaser now made an application — the company having in the mean time become insolvent — for a dividend which had been declared. But the application was dismissed with costs, though it was made in the name of K.

THIS was a petition praying that the receivers of an insolvent insurance company be compelled to pay to the petitioner his alleged share of a dividend which had been declared. The rest of the case is stated in the opinion.

G. Griffin for the petitioner.

D. Lord, for the receivers.

THE VICE-CHANCELLOR. By the policy of insurance in question, the Mutual Insurance Company insured Blake against loss and damage by fire, he being the owner of the premises at the time of the contract.

By an assignment of the policy to Kip, the mortgagee of Blake, made with the consent of the company, it enured to the benefit of the former as collateral security for the payment of his mortgage debt. This was the only object of the assignment to Kip. In case of loss, he was to receive payment on the policy, and then, as between himself and Blake, he was to apply the money towards liquidating the mortgage; or if Blake should himself pay off the mortgage, he would be entitled to a return or reassignment of the policy from Kip, and could then receive the insurance money himself.

But to entitle Blake to the benefit of the policy in case of loss, either for the purpose of liquidating his mortgage debt, or for his own indemnification, after he should have paid off that debt and entitled himself to a return of the policy, it was essential that he should remain the owner of the premises insured.

The sale of the property by Blake to Bloodgood put an end

¹ 4 Edw. 86.

to the contract of insurance as between Blake and the company, except so far as Kip's right to it extended by way of collateral security as before mentioned. That right no act of Blake's or of the company could divest without Kip's consent. He might still claim to hold the policy for the benefit of his security, which was all that remained of the contract after Blake had parted with all his interest in the property; and if the company were obliged to pay Kip for a loss of the property insured, they, standing in the relation of sureties to him for so much of the mortgage debt, would be entitled, by subrogation, to the benefit of the mortgage for their reimbursement as sureties, after Kip should be paid in full. This would not be so if the contract of insurance still remained in force for the benefit of Blake. But it did not — his sale, as before observed, terminated it. Bloodgood, by becoming the purchaser, acquired no right to the policy of insurance or the benefit of it, unless Blake had assigned his reversionary interest in it to Bloodgood and the company had assented, thereby becoming, in effect, insurers to him. The company never contracted to insure Bloodgood as the owner, and they could not be made to do so by assignment from Blake or from Kip without their consent. These views appear to me to be sustained by the principle established in the case of *The Aetna Insurance Company v. Tyler*, 16 Wend. 285, and *The Traders' Insurance Company v. Robert*, 9 Wend. 404; S. C. in error, 17 Ib. 631. Mr. Bloodgood became the owner of the premises before the loss by fire occurred, although the deed of conveyance appears not to have been actually delivered until after the fire. Still, he had an insurable interest as owner from the time of his contract by purchase. He, however, took no measures to insure himself by virtue of the policy in question. And although this application is made confessedly on his behalf and for his benefit in the name of Kip, the mortgagee, yet he can have no better or more extensive right or equity than Kip could claim. If he was before the court on his own account claiming the dividend which the receivers are enabled to make among the creditors of this insolvent company, he would be obliged to give them an interest in the mortgage for and towards their reimbursement. The present application appearing to be prosecuted for the benefit of Bloodgood and

Policy. — Conditions. — Validity.

upon a bond of indemnity to Kip for the costs, must be denied, with costs to be taxed and to be paid by Bloodgood, the ostensible party to it. And if Mr. Kip has any apprehension of an insufficiency of his mortgage security to pay his debt so as to deem it worth while to claim and receive a dividend upon the amount of his policy on the terms suggested, viz., admitting the receivers to take an interest in the mortgage for and towards their reimbursement out of the money to be derived from a foreclosure of the mortgage after Mr. Kip shall be paid and satisfied, he must be left to do so.

BEADLE vs. THE CHENANGO COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, July Term, 1842.)

Policy. — Conditions. — Validity.

A condition in a fire insurance policy, that if the insured refuse or neglect to pay any assessment made upon his premium note by the company, is valid; and its breach avoids the policy.

THE question in this case arose upon the neglect or refusal of the plaintiff to pay one of the assessments made upon his premium note, which, by the terms of the policy, avoided the insurance. The plaintiff contended that the condition was unreasonable and invalid.

B. D. Noxon, for the plaintiff, cited *Matter of Long Island R. Co.* 19 Wend. 37.

N. Hill, Jr., for the defendants.

PER CURIAM. The parties may insert what conditions they please in a policy, provided there be nothing in them contrary to the criminal law or public policy. This is constantly done in marine policies, and the principle which upholds it there extends to all other policies. *The Matter of the Long Island Railroad Company*, 19 Wend. 37, has no application. The terms of forfeiture were there imposed by the company. Here the condition was inserted by mutual consent.

Judgment for the defendants.

Consignment. — Equity. — Policy varying from Terms of Agreement.

FRANKLIN FIRE INSURANCE COMPANY OF PHILADELPHIA *vs.*
HEWITT, ALLISON & COMPANY.¹

(Court of Appeals, Kentucky, October, 1842.)

Consignment. — Equity. — Policy varying from Terms of Agreement.

In a policy effected by commission merchants, goods held on consignment may be described as "their stock."

Where insurers contract to deliver a policy covering specific property, and a policy be delivered (though not formally accepted) variant from the contract, and a loss occur within the insurance contracted for, a court of equity will grant relief according to the contract agreed on.

Though the insured might be concluded by the acceptance of a policy variant from that contracted for, yet when it appears that such a policy was received by a clerk, and its terms were not known until after a loss, an acceptance will not be inferred, and the insured will not be concluded by the policy.

Judge MARSHALL delivered the opinion of the court.

This bill was filed by Hewitt, Allison & Co., to rectify a policy of insurance, averred to have been made out by mistake or fraud, in terms not embracing the subject intended, to recover for the loss, according to the agreement set up, independently of the policy. The contract of insurance was negotiated on the part of the insurance company, by Wm. S. Vernon, their agent in Louisville, who, upon receipt of the premium, delivered a receipt or certificate, dated on the 15th of April, 1840, and to the effect that he had "Received of Messrs. Hewitt, Allison & Co. \$55 premium for Fire Insurance, in the sum of \$10,000 on their stock of merchandise, generally contained in their three story brick building, metal roof, situated on the south side of Main Street, between Fifth and Sixth streets, city of Louisville, Kentucky, and occupied by them as a commission house," &c. The insurance to continue for one year from that date, at 12 o'clock meridian, on the terms and conditions of the policies issued by the Franklin Fire Insurance Company of Philadelphia. The certificate to be void on delivery of the policy. A few weeks after the date of the certificate, a policy was sent out by the company at Philadelphia, and delivered, as the certificate had been, to the chief clerk of Hewitt, Allison & Co., by whom also the premium had been paid. The policy insures Hewitt, Allison & Co. (according to the printed proposals

¹ 3 B. Mon. 231.

and conditions annexed) upon "their stock of merchandise generally contained in their new three story brick building, fire proof, situated on the south side of Main Street, between Fifth and Sixth streets, Louisville, Kentucky, occupied by them." One of the conditions annexed to the policy was, that "goods held in trust, or on commission, are to be insured as such, which may be done by inserting the words, 'for account of whom it may concern,' otherwise the policy will not cover such property." On the 24th of November, 1840, a fire occurred by which the merchandise then contained in the building described in the policy was consumed, to the value of \$5,179.84, of which all, except goods to the value of \$114.15, were the property of others held on consignment, and for sale by Hewitt, Allison & Co., who then had in that building merchandise to the value of \$114.15, only. But they then had other goods, both of their own property and on consignment, in a contiguous building, and they had in their buildings at the time of the insurance, goods on consignment of the value of \$10,000 or upwards, and also goods of their own not exceeding \$5,000, as stated by their clerk, from an examination of the books, but exceeding \$10,000, as proved by the agent and two other witnesses, to have been admitted by one of the firm after the fire. In what manner or proportion either class of these goods was distributed among the different buildings or warehouses, at the time of the insurance, does not appear. But it was proved by the clerks, that they had advertised to do an exclusive commission business, and that their own goods were not expected to be long on hand. The insurance company having refused to pay any part of the loss upon the goods held on consignment, and they not being embraced in the policy, Hewitt, Allison & Co. filed their bill, alleging, among many facts, which are denied, the following, which is not denied, and which being moreover proved by the certificate, and referred to in it, may properly be considered in giving construction to it, viz.: that in applying for the insurance, they informed the agent that they were commission merchants, doing business as such in their said building. It is also alleged, and not denied, that he knew that they had on hand, and were constantly receiving goods on consignment, on some of which they were making advances, and on others

insurance was ordered by the consignors, and also that they applied to the agent for insurance on the stock of merchandise contained, &c. ; and it is expressly proved, that before the negotiation for the insurance was complete, they told him they wanted insurance on the consigned goods, and but for them and the orders of their owners, they would not care about it. These circumstances clearly indicate the character and purpose of the application. They leave no room to doubt that insurance was desired, and must have been understood as being desired to cover consigned goods, and in our opinion, they afford a proper key to the true construction of the words "occupied by them as a commission house," which are introduced into the certificate. That the three last of these words were not deemed requisite for the identification of the building in which the goods were contained, is proved by the omission of them in the policy. For what purpose then were they inserted in the certificate? We answer, not merely to identify the building, but to show the character of the business done in it, and of the stock of merchandise contained in it, and thus to indicate the character and extent of the insurance intended to be effected. And this inference may be drawn from the face of the certificate itself, as it shows the principal facts referred to without other evidence. The word "their," used in the certificate as designating the stock to be insured, may, in its strict sense, denote absolute property, and might, if it stood unqualified by other words or circumstances, confine the insurance to the stock of which the insured were the actual owners. But it is also susceptible of another sense, and it is one in ordinary use, in which it denotes not absolute or general ownership, but the precise relation of special property, which sustains between a consignee, agent, or bailee, and the goods of others which may be in his possession and under his control; and in this sense the possessive pronoun "his" or "their," is often used even in legal proceedings, in which proof of special property, or even of possession alone, is deemed sufficient to sustain the title implied by the use of one of these words.

Has a commission merchant, whose house is filled with goods of others held on consignment, for sale by him, but who has no goods of his own, no stock? Most assuredly it is no misuse

Consignment. — Equity — Policy varying from Terms of Agreement.

of terms to say, that as commission merchant he has a stock, and that the goods held on consignment and commission constitute his stock. The absolute sense of the word "his" is plainly qualified by the character in which he holds the stock. The reference in the certificate to the manner in which the insured occupied the building, and to the business done therein, clearly shows that they had goods on commission in the building, and that such goods constituted the stock in the business referred to. These facts are sufficient to authorize the use of the word "their," as applied to the relation in which the insured stood to the goods on commission. And as there was no necessity nor sufficient reason for referring to these facts in the certificate, but to show that the insured had goods on commission to which the word "their" was intended to be applied; and as, moreover, the reference by the insured to their character of commission merchants, in applying for insurance, plainly indicating their desire to be insured on goods held in that character, required a reference to such goods to be made in the certificate which was to contain the elements of the contract, we are of opinion that the reference in the certificate to the character of the insured, and of the business done by them in the building in which the goods to be insured were contained, should be understood as having been introduced for the purpose of indicating that goods belonging to the business referred to were to be insured, and of thus qualifying the word "their," and showing that it was applied to the goods held in the character and business referred to. This construction is not affected by the fact, that the insured had goods of their own at the time of the insurance; for it is not shown that the agent, before giving the certificate, knew that they had any other goods but those held on commission in either of the buildings, except by evidence which also proves that he was informed by the complainants that they wanted insurance to cover consigned goods, and that if they had none but their own, so confident were they in the security of their buildings, that they would not insure at all. And as this information pointed out what was the principal object of the desired insurance, if this had not been sufficiently done before, so it made it his duty in making out evidence of the contract to use language which would cover the

intended subject, and is a reason for giving that effect to the language actually employed, if it can be reasonably done. If he did not know the fact that there were other goods than those received and to be received on consignment, then also, as he must necessarily have known that goods on consignment were intended to be insured, the same duty resulted on his part, and it tends to the same construction of the certificate. And whether he knew or did not know that there were other goods, or from whatever source he may have derived his knowledge, as the terms and manner of the original application apprised him that insurance on goods held on consignment was desired, the same duty, and the same rule of construction followed his acceptance of the risk. There might indeed be a question, whether the application was such as to embrace both classes of goods, and whether the certificate should be construed as embracing both; or it might have been a question, if the agent had not known that there were other goods than those held on consignment, how far the withholding of that information might have affected the contract. But there being no question that the agent knew that there were consigned goods, and that insurance upon them was desired by the applicants, there can be no question that the certificate ought to have been expressive of a contract covering those goods. And as it shows on its face that the complainants had and were expected to have, in the building described, goods held on consignment, which might constitute their stock of merchandise, and does not show that they had or expected to have any other goods there, the fair conclusion is that those goods were intended to be embraced. Nor is the construction which we have given to the certificate repelled by the condition annexed to the policy, requiring goods held in trust or on commission to be insured as such, and containing a form of expression by which they may be included. The condition shows that goods held on commission may be insured by the consignee. But while it states one set of terms by which they may be insured, it does not prescribe those as the only terms to be used. It only requires that such terms shall be used as will indicate that the goods insured are held in trust or on commission. But if a commission merchant, having and expecting no goods but such as were and might be

received on commission, should apply to an insurer, perfectly cognizant of these facts, for insurance on his stock in trade, or on his stock of merchandise contained, &c., and on paying the premium agreed on should receive a policy insuring him on "his stock of merchandise contained," &c., could it be that if his stock held on commission were consumed during the period named in the policy, the insurer could be borne out by this condition annexed, in saying that there was no insurance? Or would not the facts and his knowledge of them, and the certainty that goods on commission were the real subject of the contract, fix the policy upon the goods held on commission, though there was nothing in the instrument from which it could be said, without recurring to extrinsic facts, that goods on commission were insured? These questions need no answer. As the complainants had goods of both descriptions in their building at the time of the fire, and as the policy does not contain the words of the certificate, showing that the building was occupied by them "as a commission house," or any other words indicating the particular nature of the business then carried on, or to the character in which they held the goods therein contained, or any of them, except the words "their" stock, &c., which, if unqualified, might mean their own stock, it may be that the policy could not, in consequence of the condition annexed, be fixed upon the consigned goods or extended to include them. Whether, if the policy had contained the omitted words which are contained in the certificate, it could, under the operation of the condition, have been fixed upon the consigned goods, either with or without the aid of extrinsic facts, would be a different question, as in that case there would be enough in the policy itself to indicate that consigned goods were the subject of insurance. We are inclined to the opinion, that if this conclusion were rendered doubtful by the extrinsic fact, that the insured goods of their own as well as those held on consignment, that doubt might be removed by the extrinsic facts accompanying the application, so as to fix the policy upon the consigned goods without a violation of the condition. But be this as it may, the certificate contains no such reference to the conditions annexed to the policy as would authorize them to be made a test of its meaning. It does indeed say, "This in-

insurance to continue on the terms and conditions of the policies issued by the Franklin Fire Insurance Company." But this clause subjects the insurance itself, and not the construction of the certificate, to the conditions of the policies. And as the certificate, according to a rational interpretation of its terms, shows that consigned goods were insured, and as they were known and represented to be such when the insurance was effected by accepting the proposal and receiving the premium, it follows that they must have been in fact insured as such, although they were not specifically named as such in any written evidence of the contract. And whatever degree of particularity might be required in the policy itself, it is sufficient that the certificate indicates, with reasonable certainty and without any ambiguity on its face, that the insurance was in fact made upon goods which the agent knew were held and expected to be received on commission. But the certificate, though it evidences a contract which the defendants are bound to comply with, by furnishing a policy covering the subject which it indicates as having been insured, or by furnishing the indemnity which the insurance implies, is enforceable against them in chancery only (per Woodworth, 4 Cowen, 661); it does not profess to be a contract in their names, and is not so executed. If, then, they had delivered no policy, as according to the import of their agent's acts they were bound to do, the insured would have a remedy against them in a court of equity, perhaps for coercing the execution of a policy before a loss, and certainly for enforcing the indemnity implied in the insurance upon the occurrence of a loss by fire within the period fixed by the terms of the agreement. And the only remaining question in this case is, whether by reason of the delivery to their clerk of a policy materially variant in its effect from the original contract, as evidenced by the certificate and by their failure to object to it until after the loss had occurred, they are precluded from claiming the benefit of the original contract? We think they are not precluded for the following reasons: They allege in their bill that they had not seen the policy, and did not know of it until after the fire occurred which occasioned the loss. And this is proved as fully as a negative can be by the clerk to whom the policy was delivered, who says he immediately locked

it up with other valuable papers in a repository of which he always kept the key; that he would have known if the complainants or any of them had taken it out; and that he does not believe that any one ever saw it, and he did not himself examine it. If, as may be assumed, they never saw it, there could have been no such acceptance of it by them as would prove that they had waived the original contract, or taken this policy as a consummation of it. And although their neglect to inquire whether it had been delivered, or to examine it if they knew of its delivery, shows a high and culpable degree of carelessness, we think it would be visiting upon them too heavy a penalty for this neglect, to say that by that alone they had forfeited the indemnity for which they had paid the stipulated price, and especially as they still held the certificate which bore evidence of the contract, and as they had no reason to anticipate a variance from it in any policy which had been or might be furnished, and as it is moreover by no means certain, nor even very probable, that, had they inspected the policy, they would at once have detected the variance, or become aware of its importance until they had demanded payment upon it.

If the original contract of insurance had embraced the consigned goods only, and the policy had embraced only the proper goods of the insured, and both of these facts had been known and understood by the complainants, and they had permitted the policy to lay by them for months or even weeks without objection, they certainly could not have been allowed, after a loss, falling almost entirely upon the consigned goods, to reject the policy and stand by the original contract. And if such had been the obvious import of the two instruments, they might not have been allowed, on the ground of ignorance, and certainly not on the ground of negligence, to exercise so dangerous a privilege. But although the original contract and the certificate include goods on consignment, to show which has been the chief object of what has been said on the subject, we are of opinion that both classes of goods were embraced. The complainants had, at the time of applying for insurance, goods of both classes, as was known to the agent to whom the application was made, and as, in fact, was communicated to him at the time. They applied to insure the stock of merchandise

Consignment. — Equity. — Policy varying from Terms of Agreement.

contained in their buildings, which would include the whole stock, as well of their own goods as of those on commission; and so would the word "our," if they had used it as they probably did, in reference to the stock; and so does the word "their," which is used in reference to it in the certificate — and it is not proved that they applied for insurance exclusively on consigned goods. The complainants therefore were not in such a condition that their election between the two contracts might have been affected by the proportion of the loss which should fall on one or other class of goods. But as both classes were protected by the original contract to the value of \$10,000, and it does not appear that goods exceeding that value were at any time in the building described, and as one class only was protected by the policy, it may be assumed that they would at any time, whenever apprised of the difference, have rejected the policy or required its reformation. And the question is not whether they shall be allowed, after the loss has fallen, to make an election which they might not have made before, and thus to throw a heavy loss on the insurers, which, if the election had been made before the event, might not have fallen on them; but whether the complainants have, by their mere delay in examining a policy which they would undoubtedly have rejected as soon as they understood it, lost the advantage of their actual contract, and whether the insurers shall, by that delay, which can be attributed to no sinister motive, be saved from a loss of \$5,000, which, under their original contract, they were liable to sustain, and which they would have been bound to sustain under the policy, if, as was their duty, they had framed it so as to effectuate the object of the actual insurance. This question we have already answered in favor of the complainants.

In the view of the case which we have taken we have not deemed it material to inquire whether the variance in the policy from the certificate was not occasioned by fraud, accident, or carelessness. We think the policy, as made out, is not such an instrument as the defendants were bound to make in consummation of the contract of their agent; that the delivery of the policy, as made, did not discharge them from their obligation to comply with that contract; and that the complainants are not precluded by their own acts or conduct from the benefit

Consignment. — Equity. — Policy varying from Terms of Agreement.

of that obligation, but may enforce it in equity, and are therefore entitled to a decree for the full value of the goods consumed in the building mentioned in the certificate, as well of those held on consignment as of those which were their own peculiar property.

Nor have we deemed it necessary to discuss the parol evidence, going to elucidate the question as to the term and extent of the application for insurance. We have given some effect to certain unanswered allegations of the bill on that subject, because, although the facts were not originally within the knowledge of the defendants themselves, they were within the knowledge of their agent, and not only is his knowledge of facts materially affecting the transaction to be attributed to them, but it may be assumed, from the nature of the denials contained in the answer, all of which, so far as they relate to the original transaction, are expressly based upon information that they were founded on information given by the agent after inspecting the bill, and for the purpose of enabling them to answer it, if indeed the answer was not, as it probably was, drawn up by him or under his dictation, and sent on to the company at Philadelphia to be authenticated by their seal and the proper signatures, from which facts and considerations a presumption arises that the undenied allegations are true. And we may now add that this presumption, as to the most material of these allegations, is not only corroborated by the tenor of the certificate, but also by the testimony of three witnesses, of whom two depose directly to the fact that in the course of the negotiation for the insurance and in reference to it, and before it was agreed on, though after the first application, which was verbal only, had been made, the complainants communicated to the agent expressly, not only their desire to insure the consigned goods and their reasons for it, but also told him that this constituted their principal or only motive for effecting insurance at all. The agent, it is true, says in his deposition that he does not recollect this communication, and gives as a reason why he may have paid no attention to it if it occurred, that he was then examining the building with a view of fixing the premium, and that the subject of insurance having been, as he supposed, fixed by the first application, he considered the subsequent communica-

tion of the complainants as being intended to affect the rate of premium by commending the security of their building, which, being usual in such cases, he disregarded. But although the immediate objects of the communication may have been to affect the rate of insurance, it also demonstrated most unequivocally that the complainants desired to insure, and thought they were insuring the consigned goods. The agent had no right to disregard such a communication. And as he must have heard it, it did in fact convey to him information in a form equally solemn as that in which the original application was made as to the real intention of the complainants in making it, and their real understanding of its import. If he understood the matter differently, surely it was his duty to let them know that they were mistaken in supposing that they had applied for insurance on consigned goods, and were negotiating for such an insurance. As he did not do so, we can but consider this communication, if not itself equivalent to the first application, as at least tending most strongly to show what it was and how it was understood. And as it thus harmonizes with the inferences deducible from the failure to answer the allegations above noticed, and also from the tenor of the certificate, we regard the conclusion that the insurance was intended and understood to embrace the consigned goods as too well established to be affected by the agent's present want of recollection, or by his denials of any express understanding that insurance was desired on such goods, or by his assertion, faintly expressed, that the complainants applied to insure their own goods, and which was probably founded rather upon his construction of the certificate, than upon any vivid recollection of the facts as they occurred.

Wherefore the decree is affirmed.

Guthrie & Nicholas, for the plaintiffs.

Duncan, for the defendants.

Paper attached to Policy.

ROBERTS vs. CHENANGO COUNTY MUTUAL INSURANCE
COMPANY.¹

(Supreme Court, New York, October Term, 1842.)

Paper attached to Policy.

A paper attached to a policy of insurance is, without express reference, *prima facie* a part of the policy, so that a violation of its terms will avoid the insurance.

THE case is sufficiently stated in the opinion of the court.

S. Beardsley, for the plaintiff.

N. Hill, Jr., for the defendants.

By the Court, COWEN, J. As I understand this case, the policy was printed on one half of the sheet, and the "conditions of insurance" on the other. There can be no doubt of the intent that both should be taken together. The assured accepts the policy with what purports to be conditions on the same sheet or any sheet physically attached. There is, in such case, no need of an express reference by the policy to the conditions in order to fix the meaning. *Emerson v. Murray*, 4 N. H. Rep. 171; *Stocking v. Fairchild*, 5 Pick. 181. The juxtaposition of the papers is a sufficient expression, at least *prima facie*. That may be rebutted by parol evidence, as by showing that the two were thus connected by mistake; but no attempt to disannex them was made on the trial, and, for aught I see, the legal effect was conceded. The proof of the building having been added by the assured so as to increase the risk, without the assent of, or even notice to the company, was received without making an objection that the conditions were not intended as a part of the policy. It would be impossible to sustain the decision in *Bize v. Fletcher*, Doug. 12, note 4, if the slip wafered to the policy had, like this, expressly declared itself to be conditions of insurance. There can be no doubt that the addition of the building avoided the policy, if conditions plainly expressed and as plainly violated can ever have that effect. There was no pretence that the risk was not increased. If there was really any question upon that, it should

¹ 3 Hill, 501.

Usage. — Policy. — What it covers.

have been left to the jury. It cannot be denied judicially in the face of the proof. I do not go into the other questions which have been made. *New trial granted.*

See *Murdock v. Chenango County Mut.* 191, *post*; *Fire Association v. Williamson, Ins. Co.* 2 Comst. 210, *post*; *Sexton v.* 26 Penn. St. 196 (1856).
Montgomery County Mut. Ins. Co. 4 Barb.

MASON & LEEF vs. THE FRANKLIN FIRE INSURANCE COMPANY.¹

(Court of Appeals, Maryland, December, 1842.)

Usage. — Policy. — What it covers.

A policy of insurance against fire upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties in the present contract.

In a valued policy against fire "on a new barque now being built," it was the design of the parties to cover the vessel in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be the progress towards completion when the fire occurred.

The policy, in the absence of proof of usage, did not attach upon articles made for the vessel, delivered in the ship-yard where it was building, in a condition and intended to be fitted and attached to it as soon as ready to receive them.

APPEAL from Baltimore county court.

This was an action of covenant, brought by the appellants against the appellees, on the 27th of April, 1841.

The plaintiffs declared upon the policy mentioned in the bill of exceptions, and the defendants pleaded that they had not broken their covenant, with leave to both parties to give any matter in evidence which might be given under any plea. Errors of pleading were waived.

At the trial of the cause, the plaintiffs, in order to support the issue on their part, gave in evidence the policy declared on to the following effect:—

"This policy of insurance witnesseth that the Franklin Fire Insurance Company of Philadelphia have received of William Mason & Co. six dollars, forty cents, premium, for insuring (ac-

¹ 12 Gill & J. 468.

cording to the tenor of their printed proposals and conditions hereunto annexed) upon the property herein described, viz.: On a new barque now being built at Samuel Butler's ship-yard, in Baltimore, Maryland. Now, know all men by these presents, that in consideration thereof, the capital stock, estate, and securities of the Franklin Fire Insurance Company of Philadelphia shall be subject and liable to make good and satisfy unto the insured, their heirs, executors, administrators, or assigns, all such damage or loss which shall or may happen by fire to the property above mentioned, from the date hereof, to the full end and term of two months, not exceeding the sum of \$4,000, say four thousand dollars, unless the said company shall," &c.

"It is agreed that this policy shall expire at twelve o'clock, noon, on the 10th of December, 1840. In witness whereof," &c.

The plaintiffs further gave in evidence that the new barque therein referred to was launched on or about the 30th day of November, 1840, and called "The Orb," having on board her lower masts and rigging belonging thereto; that on the evening of the day following the ship-yard of Samuel Butler was set on fire, and all combustible articles therein were burned up; and further, that previous to the aforesaid fire, and subsequent to the 10th day of October, 1840, certain spars, blocks, cordage, and other articles necessary and proper for the building, fitting, and equipping the aforesaid barque were prepared, finished, and delivered at and in the said ship-yard, ready for setting up, but which had never been put upon said barque, and being after such delivery at the sole risk of the owners of the said barque; that the said spars were at the time of the fire aforesaid lying within from four to ten feet from the said barque, and the blocks, ropes, rigging, and other articles were lying partly in a shop, and principally in a loft over the shop, within from forty to fifty feet of the said barque, but all within the inclosure of said Butler's ship-yard; and that it is usual for riggers and ship-builders to store the light spars, intended for new vessels, under sheds, or in the lofts of buildings in ship-yards, where there were such buildings.

The plaintiffs further gave in evidence by a witness who examined the ruins the next day after the fire, and who had worked on the materials hereinafter referred to, that the fire had

burnt the following articles: A list of blocks, rigging, and spars, belonging to the new barque "Orb," burned at Butler's shipyard, December 1st. And that neither the hull of the said barque, nor any of the materials on board of her, were burned or injured by the fire.

The plaintiffs further gave in evidence sundry accounts of articles furnished to supply such as were burnt as aforesaid, and the particulars of labor required thereon, according to a statement thereof summed up in the following paper, &c., valued at \$834.40.

The plaintiffs further offered evidence that in the month of February, 1836, a ship of the witness, called "The Jefferson" arrived at New York, where her sails were sent to a sail-loft to be repaired, and four or five new sails in place of those worn out were ordered to be made for said ship, but were not sent on board; that said ship was insured upon time; that a fire occurred in said sail-loft in New York, by which said sails were destroyed; that the witness inquired the usage as between insured and insurers in New York in regard to the loss in such cases, and ascertained that the usage there was that the insurers were liable; and upon that fact being made known to the Neptune Insurance Company of Baltimore, they paid the said loss.

The plaintiffs further proved by the same witness that he had been informed by others that the same usage in regard to vessels whose sails are sent on shore for repair, from a vessel insured on time, existed in England, but of that fact the witness had no personal knowledge. The plaintiffs further proved by the said witness that he had been informed by others that several merchants in Baltimore whose vessels had been insured on time, and upon their arrival in Baltimore, whose sails had been sent to the sail-lofts for repair, and which were destroyed by fire, were as he heard paid for their loss by the insurers. The witness further stated that he had no knowledge of any usage in such cases in Baltimore, except as deduced from the above fact and information, and knew of no usage, *pro* or *contra*, in regard to vessels unfinished, or vessels building in Baltimore.

The defendants then by their counsel moved the court for its opinion and direction to the jury.

If the jury shall believe from the evidence in this cause that the spars, blocks, rigging, and other materials and work, for the value of which this suit is brought, were never in fact put upon the barque "Orb," upon which the insurance in this cause was effected, prior to the accident by fire proved in this cause, that the plaintiffs are not entitled to recover under the policy in this cause, notwithstanding the jury may believe from the evidence that the said spars, blocks, rigging, and other materials, were intended to be put upon the barque, and would have been put upon said barque if said accident by fire had not occurred.

The plaintiffs then moved in like manner the following prayer: —

That if the jury believe from the evidence that the blocks, spars, rigging, and other articles destroyed by fire, as set forth in the evidence, were actually delivered to the plaintiffs in a finished state by the parties furnishing the same, for the purpose of being forthwith put upon the barque "Orb," and were the property of the plaintiffs as owners of the said barque, and if not insured would have been their exclusive loss, and were deposited in places near the said vessel, convenient for the then intended use thereof, and in the manner usual and customary in cases of building vessels in this city, then the plaintiffs are entitled to recover, notwithstanding the said articles had never actually been put on board, or fitted to the said vessel.

The court (Magruder, A. J.) granted the prayer of the defendants, and rejected the prayer of the plaintiffs. The plaintiffs excepted.

The verdict and judgment being for the defendants, the plaintiffs appealed to this court.

The cause was argued before STEPHEN, ARCHER, DORSEY, and SPENCE, JJ., by *N. Williams*, for the appellants, and by *St. Geo. W. Teackle*, for the appellees.

ARCHER, J., delivered the opinion of this court.

We agree with the court below, that the policy did not cover the articles, for the loss of which by fire this suit was instituted to recover. We have no proof of usage in the port of Baltimore, in relation to this subject, which would control or govern the contract of the parties. What was the usage in other ports of the Union, could not be considered as entering into the views of the parties in the formation of the contract.

The case must, therefore, be decided by the language which the parties themselves have used in the covenant of insurance.

This is a valued policy "on a new barque now being built," and the question is, what do these words import; do they apply to the ship and such materials as from time to time are placed upon her in a process of construction, or are they to be considered of more extensive signification, and as covering whatever materials were brought into the ship-yard, and were necessary to her construction, whether fitted and prepared or not, to be placed upon the vessel, though not placed on the ship, or in any way attached to it, or as constituting in fact a part of the corpus insured?

This is a case of the first impression in this state. No cases have been cited, bearing upon the question directly. The contract of insurance is, it is true, one of indemnity, but the terms of it ought not to be carried beyond their ordinary and legitimate signification. The extent of this indemnity is to be ascertained by arriving at the true intention of the parties, as expressed by the words they have used. The thing injured "is a new barque now being built," and the design of the parties was to cover the ship in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be her progress towards completion, when the fire occurred.

The articles, the value of which is claimed, it is proved, were made for the ship, and were in the ship-yard, and were in a condition to be fitted and attached to the vessel, if she had been ready to receive them. But they never had been placed upon or fitted to the vessel, so that the policy could attach to them.

Authorities have been cited to show, that an insurance on a ship covers her tackle, apparel, and furniture, *ex vi termini*, and that the sails of a vessel, taken on shore for repair, are also covered, there being a usage proved, that vessels engaged in such trade removed their sails from the ship for repair. But these cases do not, we apprehend, apply to this case, where the insurance is not on a ship, but on a barque being built, and by which the articles alleged to be insured never constituted a part and where there is no usage in the port of Baltimore, where the insurance was effected, to show that the articles lost were considered within the terms of the policy.

 Promissory Representation. — Oral Evidence.

In short, we believe that the insurance in this case covered the barque itself, as it then lay on the stocks, at the time of the insurance, and operated on such materials as should be from time to time in a course of construction put upon and attached to the vessel, so that they might be considered as a part of the vessel.

Judgment affirmed.

See *Hone v. Mutual Safety Ins. Co.* 1 Sand. 137, *post*.

ALSTON vs. THE MECHANICS' MUTUAL INSURANCE COMPANY IN
THE CITY OF TROY.¹

(Court of Errors, New York, December Term, 1842.)

Promissory Representation. — Oral Evidence.

The term "representation," in its application to insurance, has reference only to existing or past facts, and not to matters resting in intention; and therefore when a party proposing an insurance verbally agreed to discontinue a fireplace in the premises, and a policy was thereupon made out, *held*, that in an action thereon it was no defence that the fireplace had not been discontinued.

The rule that parol evidence is inadmissible to vary the terms of a written contract applied.

ACTION on a fire insurance policy, which after describing the height of the building above the basement, added "which basement is privileged as a cabinet shop." It was proved on the trial that by reason of a fireplace in the basement the defendants had at first refused to insure the building, but upon the plaintiff's promise to discontinue the use of the fireplace, the policy was issued. The defence was that the plaintiff had continued the use of the fireplace, contrary to his promise. Judgment had been given in favor of the defendants by the supreme court.² The plaintiff now took a writ of error upon this judgment.

E. C. Litchfield & A. Taber, for the plaintiff in error.

S. Stevens, for the defendants.

WALWORTH, Chancellor. The loss in this case was clearly covered by the terms of the policy. Those terms unquestionably

¹ 4 Hill, 329.

² 1 Hill, 510.

embraced a loss by fire arising from the use of the basement of the premises *as a cabinet-maker's shop*, which included the ordinary use of fire for varnishing and the melting of glue. The policy also, by implication at least, gives the assured the right to occupy and use the basement as it was used at the time when the insurance was made; for it contains an express provision that if the premises shall be occupied in any way so as to render the risk *more* hazardous than at the time of insuring, the policy shall be void. And the attempt now is to prove, by parol, that the assured, at the time this contract of insurance was made, agreed that he would thereafter occupy this basement room in such a manner as to render the risk *less* hazardous than it was at the date of the policy. The question then arises whether this supposed agreement, which, if actually made, and if there has been no misunderstanding between the parties as to its nature and extent, was of itself a part of the contract of insurance, and should have been inserted in the written policy, as a condition or warranty, can be converted into what the defendants' counsel calls a *promissory representation*; and thus avoid the policy on the ground that the assured has not performed his part of the agreement, when no such agreement is either expressed or implied in the written policy which was executed by the agents of the insurance company.

Marshall, who I admit is a writer of very considerable authority on the law of insurance, does indeed speak of two different kinds of representations, one of which he calls an affirmative and the other a promissory representation. But I have not been able to find any case in which a court has adopted this distinction. And the only other writer on the law of insurance, who appears to have considered a representation as a contract between the parties, is Ellis. He says, "A representation in insurance is in the nature of a collateral contract." Ellis's Law of Fire & Life Ins. 29. I have examined Millar, Weskett, Annesley, Hughes, Evans, Park, Beaumont, Phillips, Emerigon, Blaney, Quenault, Grun & Joliat, Vincens, Lafond, Persil, Merlin, Pardessus, Boulay Paty, and the works of some other English and foreign writers on the subject of marine, fire, and life insurances; and so far as they say anything on the subject, I find them to concur in saying that misrepresentation,

in reference to insurance contracts, is a false affirmation as to some fact, material to the risk: which affirmation is made by the assured, or his agent, either from a mistake as to the fact represented, or with a design to deceive the insurer.

Annesley says, if there be a misrepresentation, it will avoid the policy, as a fraud, but not as a part of the agreement, as in the case of a warranty. And if the representation is false in any material point, even through mistake, it will avoid the policy, because the underwriter has computed the risk upon circumstances which did not exist.' Ann. on Ins. 124. Blaney says, it is necessary that the contracting parties should have equal knowledge, or ignorance, of every material fact or circumstance which may or can affect the insurance. And if on either side there is any misrepresentation, *allegatio falsi*, or *suppressio veri*, which would in any degree affect the amount of the premium or the terms of the engagement, the contract will be deemed fraudulent and absolutely void. Blan. on Life Assurance, 59. Evans states the difference between a representation and a warranty to be, that the one induces an error in regard to the subject of the contract, and the other is a stipulation of the contract itself. And he divides representations into but two classes — those which are intentionally false, and misrepresentations through mistake. Evans's Law of Ins. 58, 64. Hughes speaks of a representation as the assertion of a material fact, which the insured knows to be false, or which he makes in an unqualified manner without knowing whether it is true or not. Hughes's Law of Ins. 345. Phillips, an American writer, whose treatise on the law of insurance stands deservedly high, says, a representation is a material fact stated before completing the contract; and a misrepresentation is the statement of such a fact which turns out not to be true. 1 Phil. on Ins. 90. And Mr. Justice Park, lately one of the English judges, a recent edition of whose valuable work on marine insurances and insurances on lives and against fire, has been published by Barrister Hildyard, places misrepresentations under the head of frauds in policies. He divides them into two classes: representations intentionally false, and the misstatement of a material fact by mistake. And he defines a representation to be a state of the case; not a part of the written instrument, but

collateral to it and entirely independent of it. He also says, if there be a misrepresentation, it will avoid the policy as a fraud, but not as a part of the agreement. 1 Park on Ins. 8 Lond. ed. 404, 433. See also Quenault, Des Assur. Terrestres, 289, Nos. 374, 375; Persil, Traité Des Assur. Terres. 297, Nos. 210, 211; Grun & Joliat, Des Assur. Terres. 260, No. 208; and 2 Boulay Paty, Cours De Droit Commercial Maritime, 87, tit. 10, § 14. Chancellor Kent also, in his brief notice of contracts of insurance, speaks of two kinds of misrepresentations only: those which are intentional and avoid the contract for actual fraud on the part of the assured or his agents; and those which arise from mistake or oversight, which do not affect the policy unless they are untrue in substance and are material to the risk. 3 Kent's Com. 283. It is hardly possible to suppose that if there was such a term known to the law of insurance as a promissory representation, rendering the contract void for the non-performance of a stipulation in the nature of a collateral executory agreement, which the parties did not think proper to make a part of the written contract, it would have been passed over in silence by all the writers I have referred to.

Nor do I find any such thing as a promissory representation mentioned in the decisions of the courts. On the contrary, Lord Mansfield, who may be called the father of the present system of commercial law in England, clearly repudiates the idea of a representation being promissory. For in the case of *Bize v. Fletcher*, referred to in Douglass, but more fully stated by Mr. Justice Park (1 Park on Ins. 441), he told the jury that there was an essential difference between a warranty and a representation. That a warranty was a part of the contract, and a risk described in the policy was part of the contract; but there could be no warranty by any collateral representation. He said the ground on which a representation affects a policy is fraud; the representation must be fraudulent; that is, it must be false and material in respect to the risk to be run. All risks are governed by the nature of them, and the premium is governed by the risk. Where a representation accompanies an instrument, it says, "I will have this understood as my present intention, but I will have it in my power to vary it." His language in this case is certainly inconsistent with the supposition that a

declaration as to any future event was in any way promissory, or anything more than a declaration of a present intention; which intention the assured would have the right to alter according to circumstances, if the underwriter did not think proper to make it a part of the contract of insurance by inserting it in the written policy as a condition precedent to his liability.

It must be recollected, too, that in the case referred to, Lord Mansfield was speaking in reference to a written representation, absolute in its terms, but relating to events which were to occur after the making of the policy. For the vessel, at the time of the insurance, was in port, and was insured upon a trading voyage from L'Orient to the Isles of France, and any port or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and until her return to her port of discharge in France; and the written representation was as follows: "Intends to sail in September or October next. Is to go to Madeira, the Isles of France, Pondicherry, *China*, the Isles of France, and L'Orient." But she did not in fact sail until the 6th of December. And instead of proceeding to China from Pondicherry, she went from thence to Bengal, and passed the winter there. She then returned to Pondicherry and took in her homeward cargo, and was on her way to her port of discharge, in France, when she was captured by a privateer. If the written representation therefore could be considered as promissory, or, in the language of Ellis, "in the nature of a collateral contract," the promise was not complied with either at the time of sailing or as to the course of the voyage.

The effect of the representation is necessarily different where it assumes the form of an absolute affirmation of an existing fact or of a past event; unless from the very nature of the representation it is impossible for the underwriter to understand it in any other way than as a matter of opinion merely. Thus in the case of *Macdowell v. Fraser*, 1 Doug. Rep. 260, where the broker represented, without explanation, that the vessel was seen safe in the Delaware on the 11th of December, when in fact she was lost two days before that time, the misrepresentation was held to avoid the policy. No evidence was given, in that case, to show how the false representation occurred. But

upon the motion for a new trial it was stated that the error arose from a mistake of the master of another vessel, in reference to the time when the lost ship left New York; which led the assured to make a mistaken computation. And the court very plainly intimate that if all the facts in the case had been communicated to the underwriter, to enable him to make his own calculation of the probable safety of the vessel on the given day, and he had then chosen to insure without requiring a warranty as to that matter, the result might have been different. So in the case of *Curell v. The Mississippi Marine & Fire Insurance Company*, 9 Louis. Rep. 163, the representation was that the ship had sailed on a particular day, when in fact she had sailed twelve days before; so as to make her out of time at the date of the policy. And the court very properly held that such a misrepresentation avoided the policy. The case of *Dennistoun v. Lillie*, upon an appeal from Scotland (3 Bligh's Rep. 202), is of a more doubtful character; and it is evident Lord Eldon was not perfectly satisfied with his own decision in that case, as he attempted to invite a reargument. Not that the representation there related to something that was to take place after the making of the policy, — for the vessel had been captured more than a month before that time, — but because the representation was not in fact made at the time when the insurance was effected. For the underwriters were only shown a letter, written a long time before the vessel sailed, stating that she would sail on a particular day. His lordship stated the question to be, whether it was a misrepresentation of an expectation, or a statement as to a past fact which was material to the risk. He came to the conclusion that it was the latter; in which conclusion, with due deference, I think he was clearly wrong. For when the letter of Duff & Co., which the underwriter must have seen was dated on the 2d of April, stated that the vessel would sail on the 1st of May, he could not have supposed they intended to do anything more than to express an opinion or an expectation that the vessel would sail at that time. And if he considered the day of sailing material to the risk, he should have inserted it in the policy as a part of the agreement, instead of relying upon it as the statement of a fact. The case would have been entirely different if the person who applied for

the insurance had stated, without explanation, that the vessel had not sailed previous to the first of May, when she had in fact sailed eight days before. For it was possible for the agent to have heard that she was at New Providence as late as the first of May, by a vessel coming direct from that island with a fair wind. In the case of *Baxter v. The New England Insurance Company*, 3 Mason, Rep. 96, the insurers were informed that the master of the "James" stated, that when he sailed the "Robert" was not to sail till four days afterwards, when in fact she had sailed four days previous to the "James." And no evidence appears to have been introduced in that case to show that there was any truth in this statement that the master of the "James" was the author of the misrepresentation. The statement that she had not sailed at the particular date was, therefore, a misrepresentation of a past fact, material to the risk as the proof showed, and rendered the policy void. But in the case of *Rice v. The New England Marine Insurance Company*, 4 Pick. Rep. 439, upon an insurance on the same risk, proof being introduced that the master of the "James" did in fact give the information, as stated in the letter upon which the defendants relied as a misrepresentation, the supreme court of Massachusetts decided that the insurers were not discharged. And, what is more material to the case now under consideration, they held that the letter of the master of the "Robert," stating that he would leave Kingston on the 12th of August, was not a representation of a fact, but an expectation merely; and therefore not a misrepresentation which would avoid the policy. So in the more recent case of *Bryant v. The Ocean Insurance Company*, 22 Pick. Rep. 200, the present judges of the same court decided that a statement made at the time of effecting the insurance, as to the nature of the cargo which was to be thereafter shipped on board the vessel, if not fraudulently made, was not a representation which would avoid the policy, if he afterwards changed his mind and took on board a different cargo. And in the case of *Allegre's adm'rs v. The Maryland Insurance Company*, 2 Gill & John. Rep. 136, where a written application for insurance stated, among other things, "said brig will sail from La Plata in the course of this month," the court of appeals in Maryland held that this was not a technical repre-

sensation of the sailing of the vessel, but a statement of the opinion or belief of the applicant that she would sail at that time; and therefore did not avoid the policy, although she did not in fact leave till more than a month afterwards.

These cases, therefore, show that a statement as to a future fact or event which is in its very nature contingent, and which the insurer knows the party could not have intended to state as a known fact, but as an intention or expectation merely, if honestly made and not with an intent to deceive, is not a collateral contract or a promissory representation which the assured is bound to see performed to render his policy valid. But if the underwriter considers the statement material to the risk, and is unwilling to insure at the contemplated premium without binding the assured to the performance of it as a condition precedent to his liability, he should make it a part of the contract stated in the policy.

Where the assured acts in good faith, without any intent to deceive, and without concealing or misstating any fact within his knowledge which it is essential to the underwriters to know, to enable them to judge of the propriety of assuming the risk and the amount of premium and other conditions of the policy, common justice requires that the party who pays the premium should be informed, by the terms of the written agreement, what is the real contract between him and the underwriters, and it should not be left to the uncertain recollection of any one to prove a different agreement from that which is contained in the written policy. For it frequently happens that where negotiations are carried on between parties, and they suppose they understand one another as to the terms of the bargain, they find, when they come to reduce their agreement to writing, that they do not understand it alike. It is for this reason that parol proof is not admissible to vary or alter the terms or the legal meaning of a written contract, by showing what either party said while the negotiation was going on. Fraud, misrepresentation, and deceit are necessary exceptions to this general rule, but there is no good reason why anything, which is in fact a part of the contract between the parties, should form an exception to the rule in an insurance case.

The case now under consideration, I am inclined to think,

shows the importance of adhering rigidly to this rule in insurance cases as well as others. For although I have no reason to suppose the president and secretary of the company have not stated the supposed agreement in relation to the use of the fireplace exactly as they understand it, I have great doubts whether the plaintiff understood that he was to be precluded by that agreement from using the fireplace to heat his glue-pot and warm his varnish; or that he was to remove his cooking apparatus from the basement room the instant the policy was signed, without giving him a reasonable time to put up his stove for cooking in another part of the house. It must be recollected that the conversation took place in dog-days, when a stove was not wanted to warm his shop, but when his family were using the fireplace in that room for family purposes. He therefore most probably spoke in reference to that use of the fireplace, when he said he would abandon the fireplace and use his stove. And as the president and secretary do not themselves agree in respect to the words he used, it is possible that both have misapprehended what he did in fact mean to say on the subject, or he may have inadvertently used language which did not properly express what he intended to agree to on the subject. That he understood he was to abandon the use of the fireplace for cooking is very probable. For it appears the family only cooked there until the next day, when he had probably gotten his stove up in another part of the house, or had made some other provision for the necessary fire for family purposes. And if he thus discontinued cooking in the fireplace in good faith, immediately after he had obtained his insurance, it is hardly probable that he would have used the fireplace for the temporary purpose of varnishing, if he had understood that his agreement with the officers of the insurance company extended so far as to embrace such a use. By the terms of his policy, the basement was privileged as a cabinet-maker's shop, which of course included the necessary use of fire for gluing and varnishing.

In *Whitney v. Haven*, 13 Mass. Rep. 172, the supreme court of Massachusetts decided that the underwriter could not set up a parol agreement between the parties, which was not inserted in the policy, to defeat the insurance, but that if the under-

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writer intended to avail himself of it, he should have made it a part of the written contract. A similar decision was made by Lord Tenterden in *Flinn v. Tobin*, 1 Mood. & Malk. Rep. 369. And in this case, no one who reads the testimony can for a moment doubt that a promise to abandon the fireplace and use a stove, was an agreement, and not a representation of a fact. I think the referees erred, therefore, in receiving parol evidence of such an agreement to defeat the policy, and that their report should have been set aside and a *venire de novo* awarded.

The judgment of the court below is therefore erroneous, and should be reversed.

BOCKEE, Senator. There is no rule better settled than that "parol evidence shall not be admitted to contradict, add to, or vary the terms of a written instrument." Whether the admission of the testimony of Garfield and Starbuck was a violation of this rule is the only point to be inquired into. If the evidence was properly admissible, or if the stipulation or agreement given in evidence had been contained in the policy, the case would present such a violation of contract on the part of the plaintiff in error as would probably bar him from a recovery. It is not denied that a fraudulent representation, material to the risk, might be proved by parol, and would avoid the policy. Fraud is an element that vitiates all contracts. A representation is of some matter extrinsic to the contract, and generally, if not always, relates to the present state and condition of the subject insured. The proof shows that the plaintiff said "he would abandon his fireplace in the basement altogether; he would not use it himself or suffer any other person to use it for any purpose whatever, but would use a stove which he had." It is contended by the defendants' counsel that this is a promissory representation, fraudulently made, material to the risk, and that the non-fulfilment of it precludes the plaintiff from recovering on the policy. How such a promissory representation, relating to a thing which the party is to do *in futuro*, is to be distinguished from a contract or agreement, I am unable to comprehend. It is a representation in no other sense than every contract, promise, or agreement is a representation that the party will do or refrain from doing a particular thing. By whatever name it is called, it is neither more

nor less than an engagement that fire should not be used in the basement fireplace. If this had been contained in the policy, it would have been a warranty, binding upon the plaintiff. Being out of the policy, it is no more than conversation between the parties, inadmissible as evidence of their rights under this written contract. If it was material to the risk, it was material that it should be inserted in the policy, or at least that the evidence of it should be in writing. It was essentially a part of the contract, a stipulation by the plaintiff adding to and varying the terms of the policy. It can hardly be said that a contract is both written and verbal. To admit parol evidence in this case would be breaking down a salutary and established rule, and there would be no longer any security in written contracts. In the case of *Bize v. Fletcher*, 1 Douglas, 284, cited by the court below, the question was not on the admissibility of parol evidence of a promissory representation, but whether a writing annexed to the policy was to be considered a part of the contract, and therefore a warranty to be strictly performed; or whether it was to be taken as a representation, collateral to and out of the policy. So in the case of *Edwards v. Footner*, 1 Camp. 530, where a ship was to sail with a certain number of guns and men, the question was whether a written memorandum not attached to the policy was to be considered a warranty or a representation. The precise question before this court is not whether a promissory representation may exist, but whether parol evidence of such representation can be given, where, if the representation was included in the policy, it would be a warranty, and where the effect of the evidence will be to add to and vary the written contract between the parties. On this question, perhaps, no decision can be found in the books exactly in point, for the reason that the rule applicable to the case is one of the most ancient landmarks of the law of evidence, and has never been questioned or disturbed. The policy of insurance was the highest evidence of the contract between these parties, and parol evidence to show the contract variant from what appears by its terms in writing, would be productive of dangerous consequences and was improperly received. The decision of the court below ought to be reversed.

The PRESIDENT, and Senators DICKINSON and HOPKINS, deliv-

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ered oral opinions in favor of reversing the judgment of the court below.

All the members of the court, nineteen being present, concurring in this result, the judgment was unanimously

Reversed.

The following is the opinion of the court below.¹

By the Court, COWEN, J. The promise not to use the fireplace, which was considered quite material by both parties, was made but grossly violated, and the house was burned down. There is no doubt that the policy was avoided by this breach of good faith, provided the promise as to the future condition of the shop can be considered a representation. It was said in argument that a representation must relate to a present fact. It generally does so, but no case has been cited showing that it may not be made of a prospective one. On the contrary, courts have certainly assumed that it may; for instance, that a ship will sail with a certain number of guns and men. *Edwards v. Footner*, 1 Camp. 530. Vide also *Bize v. Fletcher*, 1 Doug. 284, 285; *Park on Ins.* 270; *S. C. Lond. ed.* 1809. Indeed, it seems to me that if representations are to be received at all, they must very often be, in effect, promissory, however they may be expressed; as if a representation

be made in the present tense of a fact, the existence of which would be material to the safety of the ship or house insured during the whole time mentioned in the policy. This is a very common case both as to warranties and representations. Accordingly an eminent writer on insurance says: "A representation, like a warranty, may be either affirmative, as where the insured avers the existence of some fact or circumstance which may affect the risk, or promissory, as where he engages for the performance of something executory." 1 Marsh. on Ins. 450 (Am. ed. of 1810), ch. 10, § 1. No book was shown on the argument contradicting this, nor am I aware of any. A warranty is very commonly promissory, and if violated only in the letter, the policy is avoided. The only difference between that and a representation is, that the latter being collateral to and out of the policy, it is enough that it be substantially complied with. The same thing, whether in the present or future tense, which, in a policy, would be a warranty, would, out of it, affect the policy as a representation, if material to the risk.

Motion denied.

¹ 1 Hill, 510.

See *New York v. Brooklyn Fire Ins. Co.* 4 Keyes, 465. The above case is confirmed by the doctrine of estoppel in pais

by conduct, which can only arise upon a representation of past or present facts. See Bigelow on Estoppel, pp. 481-484.

Subsequent Insurance. — Notice of. — Proof of Loss.

THERÈSE DE FONTENELLE BATTAILE vs. THE MERCHANTS'
INSURANCE COMPANY OF NEW ORLEANS.¹

(Supreme Court, Louisiana, January Term, 1848.)

Subsequent Insurance. — Notice of. — Proof of Loss.

Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or indorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same indorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability.

Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition.

APPEAL from the district court of the first district, Buchanan, J.

MORPHY, J. This action is brought upon a policy of insurance subscribed by the defendants, whereby they undertook to insure the plaintiff from loss, by fire, on dry goods, millinery, fancy goods, &c., contained in a brick store in Chartres Street, to the amount of fifteen thousand dollars. The policy mentions that on the same stock of goods insurance had been effected in the Louisiana State, and the Atlantic Insurance companies, to the extent of seventeen thousand dollars each. The petitioner represents that the insurance was made by the defendants, for the space of one year from the 22d of January, 1839, and that, within that period, to wit, on the night of the 17th and 18th of August of the same year, the store and the goods insured were destroyed by fire. The defendants admitted the execution of the policy, but pleaded the general issue. The case was tried before a jury, who gave the plaintiff a verdict for \$7,000. A motion to set aside the verdict as contrary to law and evidence having been made, without success, judgment was rendered accordingly; and the defendants appealed.

Were it absolutely necessary for us to pronounce on the facts

¹ 3 Robinson, 384.

Subsequent Insurance. — Notice of. — Proof of Loss.

of this case as they appear from the record, whatever may be our respect for the verdicts of juries in general, we could with difficulty be brought to give our sanction to that obtained by the appellee in the present instance. From the papers offered by the assured as preliminary proof, the plaintiff claims that her loss on her own stock of goods was \$45,700, independent of her fixtures, and goods on consignment. But if these documents be left out of view, as they must be, because they form no part of the legal and contradictory evidence of the case, and were admitted only to show that such preliminary proof was tendered to the underwriters, the testimony adduced by the plaintiff is of the most vague and unsatisfactory character. It does not show with any reasonable certainty the quantity or value of the goods she had in the store, at or near the time of the fire; while, on the other hand, the defendants have shown a variety of facts and circumstances, calculated to cast doubt and suspicion on her claim as being one grossly exaggerated. But our attention has been called to a point which we take to be decisive of this controversy, and which renders superfluous any comments, on our part, upon the testimony and the facts of the case. 2 Phillips on Insurance, 67.

The policy provides, "that in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect; and if the said insured or her assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect; and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not, in case of loss or damage, be entitled to demand or recover, on this policy, any greater portion of the loss or damage sustained, than the amount insured on the said property," &c.

The policy sued on mentions only two insurances besides that undertaken by the defendants, one effected in the office of the Louisiana State Insurance Company, and one in that of

the Atlantic Insurance Company. On the trial below, it appeared from the oral and documentary evidence introduced by the plaintiff herself, that there had been a fourth policy underwritten by the Ocean Insurance Company on the same property. This insurance never having been notified to the defendants, nor indorsed on the policy sued on, nor otherwise acknowledged by them in writing, their counsel has urged that the plaintiff cannot recover, as her policy has become void and of no effect. The stipulations relied on by the defendants are clear, explicit, and free from doubt. They apply, whether the policy taken out of the office of the Ocean Insurance Company was executed before or after the one in suit. In either case, it should have been communicated and indorsed on it. We find, moreover, if we recur to the condition, according to which this contract of insurance was entered into, that the third condition requires, as a part of the preliminary proof without which no recovery can be had, a declaration under oath, "Whether any, and what other insurance has been made on the same property." By failing to comply with the requirements of the policy, the plaintiff has precluded herself from the right of recovering under it. 1 Phill. Ins. 420; 16 Wendell, 400; 5 Hammond's Ohio Rep. 466; 16 Peters' Rep. 510.¹ In the last case, in 16 Peters, it was held, that notice even of a voidable policy must be given to the underwriters, and that a mere parol notice of such insurance was not, of itself, a sufficient compliance with the stipulations of the policy; but that a prior policy should not only be notified to the company, but should be mentioned in or indorsed upon the policy declared on, otherwise the insurance was to be void and of no effect. The supreme court of the United States, in commenting upon the nature, importance, and sound policy of these clauses, say: "They are designed to enable the underwriters, who are almost necessarily ignorant of many facts which might materially affect their rights and interests, to judge whether they ought to insure at all, or for what premium; and to ascertain whether there still remains any such substantial interest in the insured as will guarantee, on his part, vigilance, care, and strenuous exertions to preserve the property." Whatever may be the reason

¹ *Ante*, p. 120.

Parties. — Assignee.

of these stipulations in the policy, they were known to the insured. She has, therefore, no right to complain; for she agreed to comply, on her part, with all the stipulations, in order to entitle herself to the benefit of the contract. Upon no principle of law or equity can she now call upon this court to relieve her from the performance of her agreement, and yet to hold the defendants to obligations which, but for these stipulations, they never perhaps would have entered into.

It is, therefore, ordered, that the judgment of the district court be reversed, and that ours be for the defendants, with costs in both courts.

Canon, for the plaintiff.

Grymes, for the appellants.

MANN vs. THE HERKIMER COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1843.)

Parties. — Assignee.

A fire insurance policy provided that an alienation of the property should avoid the insurance, but added that in case of alienation the grantee, having the policy assigned to him, might have the same ratified and confirmed to him for his own proper use and benefit, upon application to the directors, and with their consent, within thirty days after such alienation, and that the grantee should then be entitled to all the rights and privileges of the party originally insured. *Held*, that a compliance with these terms gave the grantee a right to sue upon the policy in his own name, and deprived the grantor of the right to sue.

THIS was an action of assumpsit on a fire insurance policy, in which the main question arose upon the right of the plaintiff to sue thereon. The premises insured had been granted by him after the insurance to one Wilson. The question arose upon the construction to be placed upon the following provision of the policy: "When any property insured with this corporation shall be alienated by sale or otherwise, the policy shall be void. . . . But the grantee or alienee, having the policy assigned to him, may have the same ratified and confirmed to him for his own proper use and benefit, upon application to the direc-

¹ 4 Hill, 187.

tors, and with their consent, within thirty days next after such alienation. . . . ; and by such ratification and confirmation, the party shall be entitled to all the rights and privileges, and be subject to all the liabilities to which the original party to whom the policy issued was entitled."

Wilson had complied with these terms.

Other minor points are stated in the opinion.

N. Hill, Jr., for the plaintiff.

A. Gardiner, for the defendants.

By the Court, COWEN, J. Admitting that the action was properly brought in Mann's name, and that the policy is valid notwithstanding the sale of the 23d of June, there would perhaps be no serious difficulty in the way of a recovery. The averment of preliminary proofs having been furnished by the plaintiff, and even signed by his name, might possibly be satisfied, though this is doubtful, by considering Wilson the substantial plaintiff, and therefore within the terms of the averment. *Cornell v. Le Roy*, 9 Wend. 163, 164, 165. At any rate, I should think we might overlook the variance as being amendable. *Mappa v. Pease*, 15 Id. 672. The disregarding of variance at the circuit is the subject of discretion, upon which a bill of exceptions will not lie. Id. 673.

But the action is brought in the name of Mann, although previous to the loss he had sold the subject of insurance to Wilson, and had assigned the policy to the same person, the latter act having been approved by the company. It is therefore objected, first, that if any action will lie, it should have been brought in the name of the assignee; but, secondly, that none will lie in the name of any one, the assured having parted with all his interest, and the requisite steps not having been taken to renew the policy conformably to the statute of incorporation.

1. Independently of the seventh section of that statute, the policy, being a mere chose in action, was not assignable at law in any form. 16 Wend. 397; 3 Hill, 88; 9 Wend. 409; 5 Id. 200, 203. But the seventh section declares that though, when the property insured shall be alienated by sale or otherwise the policy shall be void, yet the alienee, having the policy assigned to him, may, notwithstanding, cause it to be ratified for his own

Parties. — Assignee.

use and benefit, by consent of the directors, within thirty days after the alienation, on giving approved security for what he may be due on the premium note. It then declares that he shall be entitled to all the rights and privileges, &c., to which the assured was entitled. One of these rights is to sue in his own name. Having parted with all his interest both in the subject matter and policy, the company, moreover, which is the debtor, having become a party, the whole is nearly equivalent to a promise upon a new consideration to pay the amount of any subsequent loss to the assignee. If such a transaction would not give the assignee a right to sue in his own name at common law, and even divest the right any longer to use that of the assignor, yet the words of the statute are, I think, equivalent to an express declaration that the assignee may sue in his own name. The demand becomes, both at law and in equity, transferred. The consequence is that the plaintiff, Mann, should, in the case before us, have been nonsuited upon the ground that he had ceased to hold the legal interest. See *Granger v. The Howard Insurance Co. of N. Y.* 5 Wend. 200, 203, and *Ferriss v. The North American Insurance Co.* 1 Hill, 71. The effect is, perhaps, more correctly expressed by saying, that a ratification and confirmation of the policy for the assignee's own use and benefit, in the language of the seventh section, renders it a policy or obligation directly to the assignee himself. He thenceforth claims as the assured, not as a mere assignee.

2. So far, I have proceeded on the assumption that all the requisite forms for transferring the legal interest were complied with, and, among other things, that the company had actually ratified the sale within thirty days from the 23d of June, or afterwards did what was equivalent. There is no pretence, from any direct proof, that the company actually confirmed the policy within thirty days, nor indeed could they do so. Such ratification, to be available, must have been founded on the assignment of the policy, which was not made till more than sixty days after the sale. No effectual ratification within the thirty days can therefore be inferred from the letter of the assistant secretary, admitting he had authority to write the letter.

It is somewhat difficult to perceive why the thirty days should

have been mentioned by the statute as a limitation to which the assignee and underwriters must confine themselves. The statute seems to impose no obligation on the company to renew the policy, though it should be presented, with the assignment, immediately after the sale. It declares the policy void and subject to cancellation by reason of the sale, but that, by taking an assignment, the vendee may have a renewal in his own right within thirty days from the time of such sale. It struck me, at first, that the time was intended for the benefit of one or both of the parties to the transaction, and that it might therefore be waived, as, in this view, it undoubtedly was, by the act of taking a new premium note from the assignee, and the written consent of the 7th of September. Had the statute been mandatory upon the company to confirm upon request within thirty days, they might clearly have waived the restriction, for the limitation would obviously have been to effectuate their own safety and convenience. *Quilibet potest renunciare juri pro se introducto*. But that is not so. If the legislature did not mean to allow a departure from the common law rule unless such departure be within thirty days, the restriction must be regarded as one of general policy, incapable of being waived. The law might have provided that a promissory note should not be negotiated after thirty days from its date, had the legislature thought fit. In this view the limitation of time forms, as the counsel for the defendants contended, an indispensable condition.

It is not necessary, however, to pass upon the question whether there was a legal assignment or not. If there was, we have seen that Mann was an improper party. If not, the policy was avoided by the sale, and no action lies in any form, unless the transactions between Wilson, the assignee, and the company, raised an original obligation of insurance to him independently of the statute. In any view of the case there must be a new trial.

New trial granted.

Insurable Interest.

INGRAMS vs. MUTUAL ASSURANCE SOCIETY.¹

(Court of Appeals, Virginia, March, 1843.)

Insurable Interest.

According to the original plan of the Mutual Assurance Society, as developed by the acts of 1794 and 1795, none but an unincumbered fee simple estate was insurable; the insurance of mortgaged property was not thereby contemplated.

In 1796, declarations were made for assurance in the Mutual Assurance Society. In 1798, the party who declared for assurance died. And in 1821, a bill was filed by the society against his widow and heir, to subject the property insured to sale for the payment of certain quotas, which had been required in 1805 and 1809, and succeeding years down to 1820, inclusive. It appearing that at the time of the insurance the property was under mortgage, and the lapse of time being also relied on, decreed that the bill be dismissed.

By an act of the general assembly of Virginia, passed the 22d of December, 1794, an assurance was established by the name of "The Mutual Assurance Society, against fire on buildings of the State of Virginia," which act was explained by another act passed the 23d of December, 1795. These two acts will be found in the Session Acts of 1794, p. 17, ch. 26, and in the Session Acts of 1795, p. 40, ch. 41.

On the 30th of April, 1796, John Ingram, residing at Norfolk borough, declared for assurance in the said society certain property in that borough, consisting of six buildings, by three separate deeds or declarations, numbered 93, 94, and 95.

The fifth section of the act of 1794, provided for "certain premiums to be paid by the persons who shall have their property insured, at the time of such insurance, which shall be deposited and kept as a fund for the purpose of making immediate reparation to such persons as may sustain losses or damages by fire," and the sixth section was as follows:—

"If the funds should not be sufficient, a reparation among the whole of the persons insured shall be made, and each shall pay, on demand of the cashier, his, her, or their share, according to the sum insured and the rate of hazard at which the building stands, agreeable to the rate of the premiums, for which purpose it is hereby declared that the subscribers, as soon as they shall insure their property in the Assurance Society aforesaid, do

¹ 1 Rob. (Va.) 661.

mutually for themselves, their heirs, executors, administrators, and assigns, engage their property insured (but none other) as security, and subject the same to be sold, if necessary, for the payment of such quotas."

About the year 1798, John Ingram died, leaving a widow, Sarah Ingram, and three sons, of whom two died intestate and without issue, and the other, Thomas R. Ingram, survived them.

In January, 1821, a bill was filed in the superior court of chancery for the Williamsburg district, by the Mutual Assurance Society, against Sarah and Thomas R. Ingram, claiming the amount of certain quotas or repartitions required and called for on the property insured as aforesaid, in the year 1805, and in the year 1809 and succeeding years to the year 1820, inclusive, with interest on the respective quotas from the time they became due; and praying a decree therefor against the defendants, and that if necessary the buildings, together with the land on which they stand, be sold to satisfy the demands of the complainants.

The answers of the defendants stated, that when the insurance was effected the property was under a mortgage from John Ingram to one White, for £250, which still continues: that the complainants had notice of this mortgage, and by reason thereof did not hold themselves liable to indemnify Ingram in the event of a fire, until after they discovered that the property was more than sufficient to pay the money for which it was pledged, and to discharge the quotas also; in evidence of which the following preamble and resolutions were adduced:—

"At a meeting of the standing committee of the Mutual Assurance Society against fire on buildings of the State of Virginia, held 23d May, 1820, the following preamble and resolutions were adopted:

"Whereas it appears from the records of this society, that John Ingram did, on the 30th day of April, in the year 1796, enter for assurance in this society certain buildings valued at \$5,760, situated in the borough of Norfolk, as will more fully appear by reference to his declarations filed and recorded in this office, numbered 93, 94, and 95: and, whereas, it is represented

to this board that the said buildings, with the ground on which they stood, were mortgaged at and before the date of the said declarations, to wit, on the 4th day of December, 1794, to — White for the sum of £250: and, it appearing to the satisfaction of this board that a very small part of the property thus mortgaged would at all times have been sufficient to discharge the said lien: Resolved, that the insurance aforesaid, by the said John Ingram effected under the said declarations numbered 93, 94, and 95, shall be placed in all respects on the same footing as if the said John Ingram had possessed, at the time of declaring the property for assurance, a complete unincumbered fee simple therein."

The defendants also relied upon the lapse of time.

It was referred to a commissioner to ascertain whether the mortgage embraced the insured property; and the fact was established by his report, and the depositions and exhibits filed.

The cause being transferred to the circuit court for James City county and the city of Williamsburg, that court, on the 1st of January, 1835, made a decree for the sale of the property insured, to satisfy the demand of the plaintiffs.

From which decree, on the petition of Sarah Ingram and Thomas R. Ingram, an appeal was allowed.

The cause was argued by *Harrison* and the *Attorney General* for the appellants, and *C. Johnson* for the appellees.

BALDWIN, J. I think it clear, that according to the original scheme of the Mutual Assurance Society against fire on buildings, none but an unincumbered fee simple estate was insurable. This is obvious from the nature and extent of the indemnity contemplated, and the means by which it was to be furnished. It was intended that the society should be perpetual, that the security against losses should be permanent, and that its resources should be supplied, not from accruing profits, but from a perennial income, to be yielded by a capital to be raised by the contributions of its members. The plan of mutual assurance was simple, and founded upon the idea of equality amongst the members in the principles of indemnity, contribution, and authority. The premiums and quotas were to be apportioned according to the value of the property, to be ascertained by an appraisement, not of partial interests, but of the

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entire and unlimited estate; and that appraisement furnished the measure of compensation to the insured in case of loss. The owner of property declaring for insurance bound not only himself, but the property itself, not merely during his individual ownership, but in the hands of his heirs, executors, and assigns, and subjected the same to be sold, if necessary, for the payment of the quotas. And provision was made, in case of the declarant's selling, mortgaging, or otherwise transferring the property, for constituting the purchaser or mortgagee a member in his stead; and he was required to apprise the purchaser or mortgagee of the assurance, and indorse to him the policy thereof.

The original scheme might, it is true, have authorized the insurance of partial or limited interests; but that would have required special provisions adapted to such a purpose. None such are to be found in the original acts of incorporation, nor in the original constitution, rules, and regulations of the society; and a general declaration for insurance, such as is made by the absolute fee simple proprietor, must have been wholly inappropriate and abortive; for it would have furnished no criteria for graduating the premiums and quotas, nor for fixing the degree or rate of indemnity, nor for apportioning and distributing the compensation amongst successive or partial owners, or securing it to a substantial instead of a nominal owner, nor any authority to one to bind another by his declaration. Moreover, in the case of property subject to incumbrance, the effect of a general declaration, if operative, might, and often would have been, to defeat the lien of the society, by means of the paramount title of the incumbrancer. I cannot doubt, therefore, that the original plan of the institution, as developed by the acts of 1794 and 1795, did not contemplate the insurance of mortgaged property. The first authority for insurance by persons having limited interests is to be found in the act of 27th January, 1803 (Sess. Acts of 1802, 1803, p. 7, ch. 5), by which the society was enabled to insure buildings held by tenants for life, widows in right of their dower, and guardians or trustees for orphans; and the declarations of such persons were made obligatory upon the fee simple ownership, but with a provision giving to a tenant for life, in case of loss, only the interest upon the compensation during his estate, and at his death giving the principal money

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to those entitled in remainder or reversion. The next legislative enactment on this subject we find in the act of January 29, 1805 (Sess. Acts of 1804, 1805, p. 23, ch. 24), by the 10th section of which the society was authorized to form rules and regulations for fixing the quantum of interest to be insured.

It was, I presume, under the authority of these two last mentioned acts, that the society adopted the provisions in regard to partial and limited interests, to be found in sections 4–12 of the ninth article of “the constitution, rules, and regulations of the Mutual Assurance Society against fire on buildings of the State of Virginia, as revised and adopted subsequent to the 16th of February, 1809, and in force on the 15th of May, 1819.” The 7th and 8th sections are as follows:—

“Sec. 7. Any mortgagees, trustees, or creditors, for whose benefit buildings may be conveyed in trust, subscribing their declarations as such, may insure such buildings, and such insurance shall be effectual after payment of the premium, and continue to be so until the first day of April, in the following year, but no longer, unless the annual requisition or quota shall then be paid at the general office of assurance, in the city of Richmond, between the hours of nine A. M. and of three P. M., in which case the assurance aforesaid shall continue to be good and effectual until sunset of the first day of April then next succeeding; when, for the effectual assurance of such buildings thereafter, the mortgagee, trustee, or creditor shall again pay the annual requisition or quota, and failing to do so, shall forfeit all benefit of the assurance until such quota shall be paid with interest; and so of each succeeding year: provided, that such insurance shall continue to be in force only so long as the interest of such mortgagee, trustee, or creditor may exist; and in case of accidental burning of the insured premises, that the amount to be paid by this society shall not exceed the sum due to him with interest thereon: provided also, that the sum to be paid for such loss shall not exceed the amount insured, after deducting four fifths of the salvage.

“Sec. 8. Any mortgagor or debtor, who may have conveyed buildings, subscribing his or her declaration as such, may make a good and effectual insurance, on the terms and conditions which are required of a mortgagee, trustee, or creditor for

whose benefit buildings may have been conveyed in trust : provided, that in case of accidental loss by fire, the sum to be paid to such mortgagor or debtor shall only be the balance after deducting the amount due to the mortgagee or creditor with interest ; and the amount so due to such mortgagee, trustee, or creditor (if not greater than the amount insured), after deducting salvage, shall be paid to him or her, on producing proper evidence of his or her claim on the buildings so insured and consumed by fire."

These provisions, it is manifest, are wholly inapplicable to an attempted assurance in 1796, the period of the declarations in question ; and they only serve to illustrate how utterly impracticable it has ever been to effect an insurance of mortgaged property, under a general declaration as the absolute fee simple owner. According to the principles of insurance law, a material misrepresentation, whether by fraud, or which is only the effect of accident, negligence, inadvertence, or mistake, is fatal to the contract. 1 Marsh. on Ins. 347. There was no moment of time between the 30th of April, 1796, and the 23d of May, 1820, at which, if the buildings had been destroyed by fire, the society would have been bound to render to the declarant Ingram, or his representatives or assigns, a single dollar of compensation. And the only question is whether the contract, thus null and void as against the society, can be enforced against the other party. If it can, it is not upon the principles of the general law of insurance ; according to which, if through mistake, misinformation, or any other innocent cause, an insurance be made without any interest whatsoever in the thing insured, or to a much larger amount than its real value, in the one case the insurer shall return the whole premium, in the other he shall return upon all above the true value. For the premium paid by the insured, and the risk which the insurer takes upon himself, are considerations each for the other ; they are correlatives, whose mutual operation constitutes the essence of the contract of insurance. The insurer shall not be exposed to the risk without receiving the premium ; nor shall he retain the premium, which was the price of the risk, if in fact he runs no risk at all, though it be by the neglect, or even the fault of the party insuring, that the risk be not run. 2 Marsh. on Ins. 548, 549 ; *Ste-*

venson v. Snow, 3 Burr. 1240. And in several cases, even where the policy was declared void for fraud committed by the insured, he obtained a return of the premium; but it is now settled that in all cases of actual fraud on the part of the insured, the underwriter shall retain the premium. 2 Marsh. on Ins. 559-563.

In the present case, there is no evidence or even imputation of fraud in regard to the conduct of the declarant; and there is the same reason for ascribing his attempt at insurance to misapprehension, as existed in the case of *The Mutual Ass. Co. v. Mahon*, 5 Call, 517,¹ in which it was held that a leasehold interest was not insurable, and the society therefore not liable upon the policy, but that the declarant was entitled to a return of the premium. I can perceive nothing in the peculiar structure of this corporation to take the case out of the influence of the general principles above mentioned. It is true that the members of the association are the assurers as well as the assured; but the membership, as I apprehend, is created by the insurance, and if there be no insurance, there is no membership.

I express no opinion upon the question whether an action could be maintained by a declarant against the society to recover back quotas he has paid upon a void insurance. That question does not arise here. In the present case, the society is endeavoring to enforce payment of the quotas which accrued prior to its having incurred any hazard of loss, and after the lapse of many years from the time of the inception of its rights as now asserted, without any effort, so far as appears from the record, to prosecute them to a recovery. The premium actually paid is an ample compensation for any expense or disappointment incurred by the society, and there is no consideration of justice to move the judicial tribunals, especially a court of conscience, to an active interposition in behalf of such a pretension. It is true that the members of the society are bound by its constitution, rules, and regulations, so far as made conformably to law; and that by the 7th section of the 10th article of the revised constitution, rules, and regulations, it is declared that "any insurance made by any person who shall, in the declaration of assurance, have misrepresented, or failed to represent

¹ *Post*.

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truly, the capacity in which he acted when he subscribed such declaration, or his claim on or interest in the buildings offered for insurance, shall be ineffectual; the policy, if any shall have been issued, shall be void, and the premiums or quotas paid or due thereon shall be forfeited." But this regulation is evidently merely prospective, and has no application to declarations for insurance previously made; and it is therefore unnecessary to consider what would be its effect and authority, if intended to be retrospective.

The resolution of the standing committee of the society, of the 23d of May, 1820, by which they declared that the insurance in question should be placed in all respects on the same footing as if Ingram had possessed, at the time of declaring the property for assurance, a complete unincumbered fee simple therein, having been made without the concurrence of the representatives of the declarant, can give the society no rights which it did not previously possess, and rather indicates an attempt to give vitality to an act which the society had previously regarded as invalid.

My opinion is, that the decree of the circuit court ought to be reversed, and the bill dismissed with costs.

The other judges concurring, decree reversed and bill dismissed with costs.

GEORGE BEDFORD PIM & THOMAS ROGERS vs. JOSEPH REID
& others.¹

(Common Pleas, England, May, 1846.)

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The plaintiffs effected a policy of insurance against fire, subject (*inter alia*) to the following condition: "In the insurance of goods, &c., the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited therein; and if any person shall insure his goods or buildings, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force." *Held*, that this condi-

¹ 6 Man. & G. 1.

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tion was to be referred to the time when the policy was effected, and that, in the absence of fraud, neither by the general law of insurance nor by such condition, was the policy avoided by the circumstance that subsequently to the effecting of the policy a more hazardous trade had, without notice to the company, been carried on upon the premises. Upon an issue taken on a plea traversing an allegation in a declaration that a specification of the particulars of a loss by fire had been delivered by the assured to the assurers, agreeable to a condition to that effect contained in the policy of insurance, it was held *at nisi prius* that the allegation was supported by evidence of a correspondence from which the jury might infer that the assurers had dispensed with the performance of such condition. *Held*, that it is too late for a defendant to move for a new trial after judgment for the plaintiff *non obstante veredicto*.

Where a cause went down to trial with seven issues, as to two of which (going to the whole cause of action) the jury found a verdict for the defendants, and as to the other five, for the plaintiffs without assessing damages; and the plaintiffs obtained judgment *non obstante veredicto* upon the two issues found for the defendants, the court discharged, with costs, a rule obtained by the plaintiffs for issuing a writ of inquiry to assess damages, leaving it to the plaintiffs to issue such writ at their own peril.

Quære, whether a general allegation in a declaration that A. and B. (the plaintiffs) were interested in the property insured, is supported by proof that A. was mortgagor and B. mortgagee of the premises.

ASSUMPSIT on a policy of insurance against fire.

The first count of the declaration set out the policy, dated the 12th of November, 1840, which recited that the plaintiffs had paid the sum of £7 10s. to the Imperial Insurance Company as a premium for the insurance to the 29th day of September, 1841, on the property described in the policy, viz.: "On their paper-machine, stuff-chest, and all gear-work communicating, thereto belonging, including fixtures in the machine-house marked G in surveyor's report, including £50 on a small engine-yard, the sum of £500; on a steam-engine in engine-house B, the sum of £150; and on three paper-engines, fly-wheel, with machinery belonging thereto, including fixtures in a mill-house marked A, the sum of £350; in the whole amounting to £1,000;" it was by the policy declared that from the 8th of October, 1840, and so long as the said assured should duly pay, or cause to be paid, the said premium to the said company, and the acting directors of the said company for the time being should agree to accept the same, the capital stock or funds of the company should be subject and liable to pay to the assured all damage and loss which they should suffer by fire on the property mentioned in the policy, not exceeding £1,000, according to the tenor of their printed proposals and conditions accompanying the policy.

The declaration then set out the proposals and conditions

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accompanying the policy; the principal of which were as follows:—

First. Persons desirous to make insurance on buildings are to deliver into the office the following particulars, viz.: of what materials the walls and roof of each building, intended to be insured, are composed—where situated—whether the same are occupied as shops, or how otherwise; also whether adjoining to, or in the risk of, any building or place in which any hazardous trade is carried on. Houses not duly separated by party-walls are deemed brick and timber. All manufactories which contain furnaces, kilns, stoves, coakels, or ovens, or otherwise use fire-heat, are chargeable at additional rates.

Second. For the insurance of premises which contain any steam-engine, stove, coakel, kiln, or other implement, in or by which heat is produced (common fireplaces excepted), the construction and circumstances of the same must be particularly described at the time of effecting the insurance, or, if subsequently introduced, due notice must be given to the company, and the same allowed by them; otherwise the policy will be void; or if more than one quarter hundred weight of gunpowder shall be deposited at any one time in any premises, on or in which an insurance is effected, such insurance shall be void. In the insurance of goods, wares, or merchandise, the building or place in which the same are deposited is to be described; the quantity and description of such goods; also whether any hazardous trade is carried on, or any hazardous articles deposited therein. And if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent, or omit to communicate, any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force.

Third. No loss or damage by fire occasioned by invasion, foreign enemy, civil commotion, or any military or usurped power whatever, shall be made good; neither will this company be answerable for loss or damage on stock of any kind occasioned by the misapplication of fire-heat, while under process of manufacture, or for loss or damage by explosion of any kind.

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Fourth. Persons insuring property at this office must give notice of any other insurance made by them, or on their behalf, on the same property, whether such other insurance shall be made previously, or subsequently, to that which is made at this office; and such other insurance is to be indorsed on the policies subscribed on behalf of this company, and entered at their office, otherwise this company will not hold themselves liable to pay in case of loss; and after such indorsement is made, this company will pay their ratable proportion of any loss or damage by fire subsequently sustained.

Sixth. Upon the death of any person insured at this office, the policy and interest therein may be continued to the heir, executor, or administrator respectively, or be transferred to the person who shall, upon such death, be entitled to the property insured, provided such heir, &c., do procure his or her interest therein, to be indorsed on the policy at the office of this company.

That persons changing their dwelling-houses, shops, or warehouses, may preserve the benefit of their policies, if the nature and circumstances of the risk insured be not altered; but in all such cases the policy is not to be considered as remaining in force, until due notice of the removal or alteration be given at the office of the company, and the same be allowed by indorsement to be made by the authority of the company on the policy.

Seventh. All persons insured by this company who shall sustain any loss or damage by fire, are forthwith to give notice thereof to the company at their principal office in London, and as soon as possible afterwards are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and shall make proof of the same by their oath or affirmation, and produce such other evidence as the directors of this company may reasonably require, and, until such affidavit, affirmation, and account are produced, the amount of such loss or any part thereof shall not be payable or recoverable; and if there appear any fraud in the claim made to such loss, or false swearing or affirming in support thereof, the claimant shall forfeit his claim to payment thereof by virtue of his policy.

The declaration then averred that the defendants were members and the acting directors of the company; that they sub-

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scribed the policy; that the plaintiffs paid the premium and stamp duty on the policy; that the defendants promised the plaintiffs that all things in the policy of insurance, proposals, and conditions, on the part of the company to be performed and fulfilled, should be performed and fulfilled; that the plaintiffs caused the buildings, and the quality and description of the property therein to be truly described in the policy, and did not misrepresent, or omit to communicate, any circumstance which then was material to be made known to the company in order to enable them to judge of the risk so by them undertaken as aforesaid; that a certain other insurance for £1,000 had been made in another office, to wit, &c., and that the plaintiffs gave notice thereof to the first mentioned company, who indorsed the same on the first mentioned policy. The declaration then alleged compliance, on the part of the plaintiffs, with other conditions in the policy (which are omitted as not material to the question discussed); that at the time of the making of the policy, and from thence until and at the time when the property was destroyed by fire as therein mentioned, the plaintiffs were interested in the assured property to the amount of all the moneys insured therein, to wit, £2,000, that is to say, in each of the items so insured in double the amount of the proportion of the sum of £1,000 so by the policy insured on the same, and that the value thereof, was, &c. It then stated the destruction of the premises by fire upon the 19th of June, 1841; that the plaintiffs forthwith gave account of such loss and damage to the company, and did also deliver to the company, as soon as possible afterwards, to wit, on, &c., as particular an account in writing of their said loss and damage as the nature of the case would admit, and then made proof of the same by their affirmation. Breach: that the defendants had not paid their ratable proportion or reinstated the property.

There was a second count for money had and received. Damages, £2000.

Pleas: First: non-assumpsit; secondly (to the first count), that the plaintiffs were not interested, *modo et forma*; thirdly (to the same), that they did not, after the loss, give notice of such loss, *modo et forma*; fourthly (to the same), that they did not, as soon as possible after the loss, or after giving notice of

such loss, deliver in a particular account in writing of their loss, *modo et forma*. Upon each of these pleas issue was joined.

Fifthly (to the same), that before and at the time of effecting the policy, &c., a certain implement, other than a common fire-place, and in and by which implement heat was produced, to wit, a furnace, had been introduced into and fixed upon the premises wherein the said loss and damage happened, for the purpose of being used therein, and at the time of the plaintiffs proposing to effect the insurance, and from thence, &c., was used therein, with the privity and by the sufferance of the plaintiffs; that this was a circumstance material to be made known to the company, in order to enable them to judge of the risk they were required by the proposed policy to undertake; nevertheless, the plaintiffs did not communicate the fact to the company, and the policy was effected without any knowledge by the defendants or the company of the fact; whereby the policy became void. Verification.

Sixthly (to the same), that before and at the time of the making of the policy and effecting of the insurance, the plaintiffs carried on upon the premises wherein, &c., the business of paper-makers, and used the said premises as and for a paper manufactory, whereof the plaintiffs, at the time of effecting the said insurance, gave notice to the company; and that afterwards, and before the happening of the said loss or damage, to wit, on the 1st of April, 1841, the plaintiffs discontinued, and thence until the happening of the said loss or damage did discontinue to carry on the said business upon the said premises, or to use the same as or for such manufactory as aforesaid. That thereupon one Henry Butler, by the sufferance and permission of the plaintiffs, after the making of the insurance, and before the happening, &c., to wit, on, &c., and from thence until and at the time of the happening, &c., carried on, in and upon the premises and near to the insured property, a certain hazardous trade not carried on therein or thereon at the time of the effecting of the insurance, to wit, the trade of a cleaner and dyer of cotton-waste, for the purpose of making cotton wadding; whereby the risk of the insured property becoming damaged by fire, after the effecting of the said insurance, and before the happening, &c., became greatly increased; that the carrying

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on of the said hazardous trade in and upon the premises, during all the time aforesaid, was a circumstance material to be made known to the company, in order to enable them to judge of the risk they had so undertaken, as in the first count mentioned; but that, as well the plaintiffs as the said Henry Butler, at all times until the happening, &c., omitted to communicate the same to the company, nor had the company or the defendants, at any time before the happening, &c., any notice or knowledge that the said hazardous trade was so carried on in and upon the premises, or that the risk was so increased as aforesaid. And further, that, by means of the premises in this plea mentioned, the policy and insurance became void. Verification.

Seventhly (to the same), that after the making of the policy, &c., and before the happening, &c., to wit, on, &c., and on divers other days, &c., divers, to wit, ten tons of cotton-waste (being respectively hazardous articles within the intent and meaning of the said conditions), were deposited, with the knowledge and consent of the plaintiffs, in and upon the premises wherein the said loss or damage happened, and remained and were so deposited therein, at the time of the happening, &c.; that the depositing of the said hazardous articles as aforesaid, greatly increased the risk of the insured property being damaged by fire, and was, during all the time aforesaid, a circumstance material to be made known to the company, in order to enable them to judge of the risk they had undertaken. Nevertheless the plaintiffs did not, at any time, communicate the said circumstance to the company, nor had the company any notice thereof until the happening, &c., and, the said cotton-waste remained from thence continually, until the happening, &c., upon the said buildings, with the knowledge and consent of the plaintiffs, but without the knowledge or consent of the company; whereby and by means of which, &c., the risk undertaken by the company was, during all the time aforesaid, increased. Verification.

Replication to the fifth, sixth, and seventh pleas, *de injuriâ*; whereupon said issue was joined.

At the trial, before Tindal, C. J., at the sittings for London after last Hilary term, the following facts appeared:—

The plaintiff Pim, in November, 1840, carried on the business of a paper-maker upon the premises in question, and on the 12th of that month, together with the other plaintiff, Rogers, the mortgagee of the premises, effected an insurance thereon with the Imperial Insurance Company, subject to the conditions set forth in the declaration. About four months after the making of the policy, Pim, being in difficulties, ceased to carry on the trade of a paper-maker upon the premises. Soon afterwards Henry Butler, Pim's brother-in-law, came upon the premises with his family, — it did not appear under what circumstances, — and brought a large quantity of cotton-waste, which was cleaned and dyed there. At the time of the fire, some of the cotton-waste was in the mill; and several witnesses proved that it is a material liable to spontaneous ignition; and it appeared that insurance offices generally decline to insure premises where it is kept or used. There was, however, no evidence to show how the fire originated. The fact of the cotton-waste being cleaned and dyed upon the premises had not been communicated to the company. It was also proved that cotton-waste is used in large quantities in the manufacture of certain sorts of paper.

Upon this evidence it was objected to by Sir *T. Wilde* and *Manning*, Sergeants, and *F. Robinson*, for the defendants, that the plaintiffs had failed to establish the affirmative of the issue taken by the second plea. That the allegation in the second plea traversed by the second plea was that the plaintiffs were interested in the property, which in law amounted to an allegation of a joint interest;¹ whereas the interest of the plaintiff Pim was that of a mortgagor, and the interest of Rogers was that of a mortgagee.

It was answered by Sir *W. Follett*, for the plaintiffs, that the insurance having been effected by both Pim and Rogers, they were properly made co-plaintiffs as co-promisees, and that any interest was sufficient to satisfy the statute. The lord chief justice, upon the objection being taken, was disposed to nonsuit the plaintiffs, but after hearing Sir *W. Follett*, his lordship held that the description of the interest was sufficient; whereupon a bill of exception was tendered on behalf of the defendants.

¹ And see *Edwards v. Bishop of Exeter*, 5 Bing. N. C. 660.

In order to support the affirmative of the third and fourth issues, the plaintiffs gave evidence of a notice of loss, and showed that afterwards a correspondence took place between the insurance office and the plaintiffs, which, it was contended, amounted to a dispensation with the obligation to deliver a particular account of the loss.

It was objected for the defendants, that even supposing the correspondence to amount to a waiver of the condition which, it was contended, it did not, still the defendants were entitled to a verdict upon the fourth issue, which was formally taken upon the precise allegation of a delivery of a particular account of the loss, as required by the conditions as alleged in the declaration, and as traversed by the fourth plea. The learned judge overruled the objection.

Upon the sixth and seventh pleas, his lordship told the jury that the questions for their consideration were: first, whether Butler came upon the premises, and carried on the alleged hazardous trade there, by the sufferance and permission of the plaintiffs; and secondly, whether the trade carried on by him was, in fact, of a more hazardous description than that which was carried on by the plaintiffs upon the premises, at the time the policy was effected.

The jury returned a verdict for the plaintiffs upon the first five issues, and for the defendants upon the sixth and seventh.

Channell, Sergeant, on behalf of the plaintiffs in Easter term,¹ obtained a rule *nisi* for a new trial (upon the ground that the verdict was against evidence), or for judgment *non obstante veredicto* on the sixth and seventh issues, or for a *venire de novo*. In support of the second branch of this rule, he contended that the condition in the policy did not require notice of any alteration in the risk subsequent to the time when the policy was effected, and during the current year over which it extended. He cited *Shaw v. Robberds*.²

Manning, Sergeant (with whom was *F. Robinson*) now showed cause. It may be assumed, upon the evidence, that the plaintiff Pim, even if he did exercise a control over the business carried on by Butler upon the premises, at least knew of, and assented to, its being carried on there. It is not necessary

¹ 24th April.

² 6 A. & E. 75; 1 N. & P. 279.

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that there should have been any specific assent to that effect; it would be sufficient if Pim knew, or had the means of knowing that the business was carried on, and did not prevent it. In 1 Roll. Abr. tit. Action on Case (B),¹ there are several cases collected showing to what extent a party was liable to his neighbor at common law, before the Stats. 6 Ann. c. 31, and 14 G. 3, c. 78, for an injury by fire; and they establish that if the fire was occasioned by the act of a party who was upon the premises with the assent or knowledge of the owner, the owner was liable. [CRESSWELL, J. But if that party was a tenant?] No demise to Butler was shown in this case; and if there were one, it was a fact within the knowledge of the plaintiffs and not of the defendants. If a party demise without any restriction as to carrying on a noxious or dangerous trade, and the tenant do carry on such a trade, the landlord is liable. In *Rex v. Peddy*² it was held, that if the owner of land let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occurs for want of such care on the part of the tenant, the owner is liable to an indictment for such nuisance. [TINDAL, C. J. In that case it would appear that the buildings complained of had been erected by the owner himself.]³

But supposing Butler was not the tenant of Pim, and that he came on the premises as his guest or merely by his sufferance, the rule laid down in *Rolle* clearly applies. If then the risk was changed, with the knowledge of the insured, the policy was vitiated under the last clause of the first condition, which provides, that "if any person insures his buildings, and shall cause the same to be described otherwise than as they really are, to the prejudice of the company, or shall misrepresent or

¹ Translated in 1 Vin. Abr. tit. Actions (B) for Fire.

² 1 A. & E. 822; 2 N. & M. 627.

³ This would be so according to the marginal note of that case in 1 A. & E. 822; which runs thus: "If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during

the term." From this note, what is above suggested by the lord chief justice would appear to be a necessary inference; but, from the case itself, as stated in both reports, it will be seen that the nuisance complained of (common necessary-houses) had been constructed and used by the tenants of the premises before the time at which the defendant became interested in the property by purchasing the reversion.

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omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force ;” which must mean that it shall be void *ab initio*. [MAULE, J. Your construction would amount to this: that if a policy were effected for a year, and the risk remained unchanged for eleven months, and the goods were then damaged by fire, and afterwards a trade were carried on upon the premises, without notice to the insurance company before the expiration of the year, the policy would be avoided, and the insured could not recover for the previous damage.] That might or might not be. In such a case the right of action would have vested ; and it may be that the policy would not be avoided retrospectively ; but it is sufficient to say that the case supposed is not this case. [MAULE, J. The pleas do not allege that a reasonable time for communicating the alteration in the risk had elapsed before the loss, and that no notice was given.] It would have been more technical to have inserted such an allegation ; but it is mere matter of form. [MAULE, J. It seems to me more like substance. It is not inconsistent with the pleas that the plaintiffs had taken all diligent means to communicate the alteration in the risk, but that the loss occurred before they could do so.] Here, the words “omit to communicate” in the declaration and the pleas, after pleading over and verdict, must be taken in the same sense. [MAULE, J. To omit to do something, has reference to something that a party could do ; how is it shown here that the thing could be done? The condition in the policy is not that the insured shall communicate the alteration in the risk before the loss. But the defendants take a particular event, which is not mentioned in the condition, and say that the plaintiffs did not communicate before then. The allegation in the pleas is not even a general allegation of omission to communicate.] The term “omission” means something more than the mere not doing an act. It means the not doing something which the party ought to have done, and had the power of doing. [MAULE, J. It seems to me that the allegation in the pleas is the same as if the defendants had said, that the plaintiffs did not communicate before the loss ; and they might as well have said that they did not communicate

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before their birthday, or the fire at the Royal Exchange.] The reference to the loss is merely for the purpose of showing that it happened after the alteration in the risk, and the omission to communicate it. [TINDAL, C. J. Suppose the assured had given notice to the company: how would it have benefited them? They would not have set people to watch the premises.] It might have had this effect: that the extra risk having been incurred, the office might have refused to renew the policy at the lower rate of premium; or the extra risk may be considered as resembling a deviation in the case of a sea-policy, in which case even notice would not have availed the plaintiffs.

At any rate the defendants will be entitled to a new trial upon the fourth issue. [Channell, Sergeant. That application cannot be entertained now; *Deacon v. Stodhart*;¹ it should have been made as a cross motion within the proper time, or the point should have been mentioned when the present rule was obtained. The application now would be in effect a cross-rule.] *Deacon v. Stodhart* was decided upon the rule of H. 2, W. 4, reg. I. s. 65, the terms of which were not adverted to, and which was supposed, in that case, to apply to motions for new trials. But the rule speaks expressly of the less ordinary cases of motions in arrest of judgment, and for judgment *non obstante veredicto*, studiously excluding motions for new trials.² The reason why a motion for a new trial must be made within the first four days of term is, that the successful party may not be delayed beyond the time at which he is entitled to sign judgment, except when the court has reason to doubt the propriety of the verdict. That reason does not apply, when from some

¹ 2 Man. & G. 317; 2 Scott, N. R. 557.

² There is a general heading of "New trial — Motion in arrest of judgment;" but the sixty-fourth section relates to the former, the sixty-fifth to the latter. The sixty-fourth merely regulates the practice as to the allowance of the costs of the first trial in cases of motions for a new trial. It was reasonable to limit strictly the period for application for rules in arrest of judgment, or for judgment *non obstante veredicto*, because the same matters would be open to the parties upon a

writ of error, and might, and ought to have been made the subject of a demurrer to the declaration or to the plea; but the party who is aggrieved by a misdirection, and has omitted to tender a bill of exceptions, has no remedy but by a motion for a new trial. In framing the above rule of H. 2, W. 4, it seems to have been considered that it would be unreasonable to tie up the hands of the court from granting relief against that which might otherwise — and not the less so by reason of the abolition of the writ of attain — become an irreparable injustice.

cause the party is otherwise prevented from signing judgment. Here, however, the plaintiffs having obtained a rule in which, as one of the alternatives, they pray for a new trial, the defendants are at liberty to urge any topic showing which of the several alternatives, embraced by the motion, the court ought, under all the circumstances of the case, to adopt. The defendants are therefore entitled, under the present rule, to show that there ought to be a new trial, as well on the ground of misdirection, as because the finding upon the fourth issue is directly contrary to the evidence; and, if not, the court will grant them a rule to show cause why a new trial should not be had on these grounds. [CRESSWELL, J. You have been showing cause against my brother Channell's rule; and are not called on to move now. A new trial is what the other side have moved for.]

Channell, Sergeant (with whom were *Byles*, Sergeant, and *E. James*), in support of the rule. The sixth and seventh pleas do not set up any defence, arising either from the ordinary law of insurance, or from the terms of the particular policy. Fraud or misrepresentation, or the suppression of any fact existing at the time of the contract being entered into, are defences of the first class; but none such are set up in this case. The defendants, therefore, must depend upon the express terms of the policy. And they are bound to bring the case clearly within the condition which they allege has been broken. As observed by Tindal, C. J., in the case of *Borradaile v. Hunter*,¹ two classes of conditions are usually inserted in policies of insurance, the first pointing to the time of the contract, the second to things which may occur at a time subsequent. Policies that contain the latter class of conditions usually require an indorsement to be made upon the policy. In the first condition of the present policy it is expressly stipulated that if any steam-engine, stove, &c., be "subsequently introduced, due notice must be given to the company, and the same allowed by them, otherwise the policy will be void." There are several other conditions in the policy whereby notice and indorsement of things done subsequently are required. In these cases the policy would be for a year, defeasible by a breach of the condition. But the condition under discussion is not of this nature. The only words

¹ 5 Man. & G. 639; 5 Scott, N. R. 418.

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that raise any doubt are these : " Or shall misrepresent, or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake," but looking at the whole condition, it clearly refers to time present. " Misrepresentation " must necessarily do so, and the term, " omit to communicate," which merely points to a suppression of facts, as contradistinguished from misrepresentation, cannot be referred to a different period. Where there is a clear allusion to time subsequent — as in the instance of the introduction of steam-engines, &c. — a notice to the company, and an allowance by them, are required, but neither is mentioned in this instance. [COLTMAN, J. According to your construction, the assured would not be bound to give notice of such an alteration of risk at the renewal of the policy.] Certainly not till then. Probably they might be required to do so then, as a renewal would be tantamount to a new contract. The argument on the other side must go this length, that if a dangerous trade were carried on upon the premises for one day or one hour, and the fact was not communicated to the company, the policy would be avoided, although no fire had occurred. In *Shaw v. Robberds*,¹ the plaintiff insured premises against fire, by the description of a granary, &c., and " a kiln for drying corn, in use," communicating therewith. By the conditions of insurance, the policy was to be forfeited unless the buildings were accurately described, and the trades carried on therein specified ; and if any alteration were made in the building, or the risk of fire increased, the alteration, &c., was to be notified and allowed by indorsement on the policy, otherwise the insurance to be void. The plaintiff carried on no trade in the kiln except that of drying corn, but, on one occasion, he allowed the owner of some bark, which had been wetted, to dry it gratuitously in the kiln, and this occasioned a fire by which the premises were destroyed on the third day after the drying of the bark commenced. Drying bark is a distinct trade from drying corn, and more hazardous, and insurers charge a higher premium for bark-kilns than corn-kilns ; and it was held that the assured was not precluded from recovering, either on the ground

¹ 6 A. & E. 75 ; 1 N. & P. 279.

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of an alteration of risk, or (in the absence of fraud) because the fire had arisen from his negligence. There the fire took place in consequence of the very act complained of, which was not proved to be the case in the present instance. In that case two conditions were under consideration, the third, which related to the nature of the building and the trade carried on therein at the time the policy was effected, and the sixth, which referred to alterations or additions made afterwards, and the court adopted the distinction between conditions as to time present and conditions as to time subsequent.¹ A policy is often made out in point of fact after the premium has been paid, and that may account for the introduction of the words, "the risk they have undertaken." The contract is executory in the first instance, and is completed when the policy is drawn up. The conditions contemplate a tender in writing. The words "have undertaken" refer to the policy executed, and the words, "or are required to undertake," to the executory nature of the contract before the policy is effected. It is consistent with the statement in these pleas, that after the change in the trade some one was sent to give notice thereof to the company, and that the fire happened before he arrived at the office. Each allegation in the pleas is hampered by the terms of the allegation as to the point of time. It has been said that the increase of risk was like a deviation in a sea policy; but, in such a case, the insurance is upon a particular ship for a particular voyage;

¹ It may be observed that the judgment in that case proceeds upon the ground that there had been no misdescription of the premises, within the third condition of the policy, and no alteration in the business, by the fact of the gratuitous drying the bark, within the sixth. But the latter condition does not mention an alteration in the business. It speaks of an alteration in the building (which there clearly had not been), and it also provides that if "the risk of fire to which such building is confined be by any means increased, notice shall be given." The jury found that drying bark was more dangerous than drying corn, and the result clearly showed that the risk of fire had been increased. It was, however, in-

creased by that which, although injurious to the insurers, yet, being temporary, would not be capable of becoming the subject of "allowance by indorsement," unless such allowance was intended to be retrospective as well as prospective. The case was probably considered to be one of hardship on the plaintiff, who had permitted the owner of the wetted bark to use his premises for drying it. If, however, neither the permission nor the result could affect the policy, the propriety of the course taken by the plaintiff in increasing the chances of destruction by fire, without the knowledge of those by whom the additional risk was to be borne, would appear to be questionable.

it is like an insurance upon goods in a particular house, in which case the insurance is upon the goods and not upon the house, although the policy is at an end if the goods are removed. [MAULE, J. The argument on the other side is, that any increase of risk would vitiate the policy.] According to the condition and the terms of these pleas, it must be such an increase of risk as was material to be made known to the company.

(He was then proceeding to argue upon the effect of the evidence when he was stopped by the court.)

TINDAL, C. J. It appears to me that the plaintiffs are entitled to judgment, notwithstanding the verdict upon the issue raised by the sixth and seventh pleas. (His lordship read the pleas in question.) I am of opinion that, on general principles, a policy of insurance is not avoided by an alteration in the trade carried on upon the premises. *Shaw v. Robberds* is an authority upon that point.¹ Then, the question is whether the present policy is avoided by the terms of the condition under consideration. We are to put a fair and reasonable construction upon that condition; and it would be neither a fair nor reasonable construction that the policy should be avoided under the circumstances stated in these pleas. The party insured is "to communicate any circumstance material to be made known to the company, in order to enable them to judge of the risk they have undertaken;" but how can an alteration in the business after the policy has been effected be material to be made known to the company to enable them to judge of the risk they have undertaken? This condition seems to refer to a state of circumstances anterior to the policy. There is a material distinction between matters to vitiate the policy, arising subsequently to the execution thereof, and such matters existing at the time the policy is effected. The statement in the first condition in this policy, that "in the insurance of premises which contain any steam-engine, &c., or other implement in or by which heat is produced (common fireplace excepted), the construction and circumstances of the same must be particularly

¹ In *Shaw v. Robberds* the court of queen's bench held that there had been no alteration in the trade carried on upon the premises, although it is true that the question, whether there had been such an alteration or not, was immaterial in that case, the conditions being silent as to such alterations, and referring to no alterations except alterations in the building. Vide *supra*, p. 259.

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described at the time of effecting the insurance," is followed by these words: "or, if subsequently introduced, due notice must be given to the company, and the same allowed by them, otherwise the policy will be void." There is, therefore, a specific declaration that if the mode by which heat is produced is subsequently altered, the policy is to be void, unless notice thereof has been given to the company. Then comes the clause upon which the present question arises: "In the insurance of goods, &c., the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited therein; and if any person or persons shall insure his or their buildings or goods, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent, or omit to communicate, any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken or are required to undertake, such insurance shall be of no force." Now it would be obvious that the whole of this clause would be applicable to the state of circumstances before the policy was executed, but for the words "in order to enable them to judge of the risk they have undertaken or are required to undertake." But I think the explanation of the words given by my brother Channell is the correct one; and that they refer, in the first place, to the case of a policy that has been effected, and in the second, to a tender before the policy has been effected; and that the condition does not contemplate any change after the execution of the policy.

Upon these grounds, I am of opinion that the defendant is entitled to judgment upon the sixth and seventh issues, *non obstante veredicto*. It is therefore unnecessary to consider the allegation of notice.

COLTMAN, J. I am of the same opinion. Independently of the conditions, there is nothing contained in the policy from which we can say that it would be vacated by a mere change of business. It is effected upon a paper-machine and other property therein described; and the circumstances of cotton-waste having been lodged on the premises, and the danger of fire having been thereby increased, must be provided against by

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a specific condition ; otherwise, upon the authority of *Shaw v. Robberds*, the policy would not be avoided. As regards the present case no answer has been given to the observation of my brother Maule, that, at any rate, the policy would not be avoided, unless a reasonable time had elapsed for the communication to be made by the assured to the company, and that the pleas do not allege that such reasonable time had elapsed. It has been argued that after verdict the allegation in the pleas — that the plaintiffs omitted to communicate the loss to the company — must be taken to mean that the plaintiffs omitted to do what they had an opportunity of doing ; but the allegation is, that they omitted to make the communication before the loss happened, which may have occurred five minutes after the alteration took place. I am of opinion, for these reasons, that the pleas are bad in substance.

MAULE, J. I also am of opinion that the sixth and seventh pleas are bad. It has been endeavored to support them : first upon the general principles of the law of insurance ; and, secondly, upon the special conditions of this policy. As to the first point it has been argued that, independently of the express provisions of the policy, if hazardous articles or a hazardous trade were introduced upon the premises with the knowledge or assent of the assured, after the policy was effected, it would be thereby avoided. But I conceive the law to be otherwise ; and that, in the absence of fraud, such an alteration would not vitiate the policy ; and that the insurers must pay for any loss, notwithstanding such alteration, unless by some condition in the policy they have provided against it. Upon general principles, therefore, I think the present policy has not been avoided ; and this disposes, in my opinion, of the pleas under consideration, as far as they are contended to be good, independently of the conditions in the policy.

But it is argued, in the second place, that the pleas bring the case within the first condition of this policy ; which, it is contended, requires that if any change has taken place in the risk after the policy has been effected, such change shall be communicated to the company. This question depends upon the words of the condition itself, and also upon those of the pleas. Now in the pleas the defendants have selected the time down

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to which they say the plaintiffs were required to give notice of the alteration of the risk; namely, down to the time of the loss. But it appears to me that this has no connection with the matter in hand; and that they might as well have said that the plaintiffs were to communicate the alteration within ten minutes next ensuing, or before the Sunday next following. Independently of this, however, I agree with my lord as to the construction of the first conditions in this policy. It states, first, what shall be enumerated in the proposal to insure; and mentions that manufactories containing furnaces, stoves, &c., are chargeable at additional rates. It then provides for the subsequent introduction of steam-engines, stoves, &c. In the proposals to be delivered in as to the insurance both of buildings and goods, the description of the trade carried on is required to be stated; which clearly refers to the time when the proposals are made. Then comes the provision that if the party shall misdescribe the buildings or goods, or shall misrepresent, or omit to communicate, any circumstance to the company, the insurance is to be void. The whole argument on the part of the defendant may be said to rest upon the words in the latter part of this provision,—“to enable them to judge of the risk they have undertaken;” and it is said that this points to something to take place after the policy has been effected. But that which is to be done after the policy has been effected is, not a representation by the assured, but a judging of the risk by the insurer. I think full effect will be given to the condition by reading it in this way: “In the particulars delivered in, the party desirous of making an insurance shall rightly describe the buildings and goods to be insured, and shall not misrepresent or omit to communicate, any circumstance material to be made known to the company, in order to enable them to judge, before they execute the policy, of the risk they will incur after they have executed it.” I think, therefore, that these pleas could not be made good, inasmuch as no defence is given by these conditions which the defendants did not possess under the general law of insurance.

CRESSWELL, J. I quite agree with the rest of the court. Supposing that an alteration of the circumstances under which the business had been previously carried on upon the premises had

been made without fraud, I think that the policy would not have been vitiated by the conditions; and certainly would not have been by the general law of insurance. As to the condition in question, to adopt the language of the judgment of the court in *Shaw v. Robberds*, I think that "it points to the description of the premises given at the time of insuring; and that description was, in this instance, perfectly correct. Nothing which occurred afterwards, not even a change of business, could bring the case within that condition, which was fully performed when the condition first attached." Indeed, it seems to be agreed that the present condition would have no bearing upon the question as to the change of risk, but for the words "they have undertaken." I think it clear, however, that these words do not apply to anything to take place during the current year. The policy is to be valid from the 8th of October, 1840, and so long as the assured shall duly pay or cause to be paid the premium to the company, and the acting directors of the company for the time being shall agree to accept the same. No fresh proposal appears, therefore, to be expressly required on either side at the end of the first year; but it may then be very material for the company to know of any change in the extent of the risk, to enable them to determine whether or not they will continue the insurance. I do not, however, disagree with the view taken by the rest of the court of the words in the condition; and I quite concur in the technical view taken of the pleas.

Rule absolute.

Manning, Sergeant, then moved for a new trial on the third issue, and submitted that the motion was in time. [CRESSWELL, J. Can you have a new trial after judgment?] The judgment remains ambulatory during the term. Judgment has been arrested formerly even after execution issued. As yet there is no judgment of the court, though the judges have pronounced an opinion. [TINDAL, C. J. Why did you not make a cross motion, or state at the time the plaintiffs obtained their rule *nisi*, that you meant to take advantage of the objections?] The defendants were not bound to know anything about that motion till they were served with the rule. By the issue taken on the replication, the plaintiffs admitted that their action was

barred by the pleas, if the facts stated in those pleas were true. [MAULE, J. You were bound to know that you had got a verdict on bad pleas. CRESSWELL, J. The defendants had no right to speculate upon the success of one motion before they made another.]

The learned sergeant therefore

Took nothing.

Channell, Sergeant, on a subsequent day¹ moved for a writ of inquiry to assess the damages for the plaintiffs. Undoubtedly in *Clement v. Lewis*,² where the jury had found for the defendant in six out of eight pleas comprehended in the last of two issues, and for the plaintiff on the residue of those pleas and on the first issue, without assessing damages, and the plaintiff had, pursuant to the decision of the court below, entered up judgment on *non obstante veredicto* as to the pleas found for the defendant, with an award of a writ of inquiry, and final judgment for the damages found by the inquisition, &c., a court of error reversed the judgment of the court below, as to the award of the writ of inquiry and the final judgment thereon, and remitted the record to the court below, directing that court to award a *venire de novo* to try the first issue and the last, as far as related to the pleas found for the plaintiff; holding, that the verdict found for the plaintiff on both issues was void, because no damages had been assessed. *Clement v. Lewis*, however, appears to have been decided upon the old rule, — that in all cases, when any point was omitted whereof attaint lay, the omission should not be supplied by a writ of inquiry of damages, but by a writ of *venire de novo*. As the writ of attaint is now abolished by the 6 G. 4, c. 50, § 60, that rule no longer applies. He also referred to *Eichorn v. Lemaitre*.³

A rule *nisi* having been granted,

Wilde & Manning, Sergeants, two days afterwards, showed cause.

Channell, Sergeant, was heard in support of the rule.

Per CURIAM. The plaintiffs must take upon themselves the risk of issuing the writ of inquiry.

Rule discharged with costs settled, by payment of the amount of the loss without costs.⁴

¹ 13th June.

² 2 Wils. 367.

³ 3 B. & B. 297; 7 J. B. Moore, 200.

⁴ The writ of error upon the bill of

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exceptions, and upon the judgment for the plaintiffs, *non obstante veredicto*, was not proceeded with, the action being settled,

by payment of the amount of the loss without costs.¹

The doctrine of this case has been very much shaken in England by the more recent decision in *Sillem v. Thornton*, 3 El. & B. 868 (1854), and the rule prevailing in America restored, that all descriptions in the policy, affecting the

risk, are warranties promissory, and that any change, increasing the hazard, avoids the policy; though it may possibly be otherwise if the fire was not caused by the change. See Flanders on Fire Insurance, p. 488.

GRANT & another vs. THE HOWARD INSURANCE COMPANY OF NEW YORK.²

(Supreme Court, New York, May Term, 1848.)

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A policy of fire insurance contained a provision that the building insured should not be appropriated to carrying on therein any trade, business, or vocation mentioned, such as houses building or repairing. *Held*, that the provision was not violated by making ordinary and necessary repairs upon the building. *Held*, also, that whether the making of repairs upon the building was an increase of the risk, was a question of fact for the jury, in the absence of specific language in the policy.

THE case is sufficiently stated in the opinion.

C. Humphrey & J. A. Spencer, for the plaintiffs.

W. C. Noyes, for the defendants.

By the Court, NELSON, C. J. The building was undergoing repairs at the time of its destruction by fire, and the principal question in the case is, whether such repairs are included in the memorandum of special rates. If so, the policy was undoubtedly suspended, for one of its provisions was, that in case the building should be appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous or extra hazardous, or specified in the memorandum of special rates, &c., the policy should be of no effect so long as the building should be so appropriated, applied, or used. The memorandum referred to specifies "houses building or repairing," and it is insisted that the repairs in this case fall within the last branch of this clause, viz., house repairing. I think not. It is manifest that the

¹ This and the preceding notes to this case are taken from the original report.

² 5 Hill, 10.

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clause, taken in connection with the provision in the policy, relates to carrying on the trade or occupation of house-building and house-repairing in or about the building insured, and not to the repairs of the particular building itself. It was the appropriation of the building to these purposes that the provision in the policy was directed against and prohibited. The language is, that the building shall not be "appropriated, &c., for the purpose of carrying on or exercising therein any trade, business, or vocation," "specified in the memorandum of special rates," among others, "houses building or repairing." It would be perverting a very plain and explicit provision of the contract to apply either branch of the phrase "houses building or repairing" to the subject of the insurance itself, and, in respect to the first branch, such an application would be especially absurd and nonsensical, for it would amount to a prohibition against building a house already built.

Again, to adjudge that the clause under consideration relates to the repairs of the house insured, would have the effect to cut off all right of making any repairs, however proper and necessary, — a construction that should not be admitted except upon the most clear and explicit terms.

In the case of *Dobson v. Sotheby, Mood. & Malk.* 90, the policy was on a building in which no fire was to be kept, or hazardous goods deposited. The premises required tarring, and a fire was consequently lighted, and a tar barrel brought into the building for the purpose of performing the necessary operations. In the absence and by the negligence of the plaintiff's servant, the tar boiled over, took fire, communicated with that in the barrel, and the premises were burned down. Lord Tenterden observed, that "the condition must be understood as forbidding only the habitual use of fire, or the ordinary deposit of hazardous goods, not their occasional introduction for a temporary purpose connected with the occupation of the premises. The common repairs of a building necessarily require the introduction of fire upon the premises, and one of the great objects of insuring is security against the negligence of servants and workmen."

The remaining question in the case, viz., as to the effect of the new erections upon the contract, depends upon two other

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conditions annexed to the policy. These conditions are, 1. "If, after insurance, &c., the risk shall be increased by any means whatever within the control of the assured, or if such buildings or premises shall be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect;" and 2. "If, during the insurance, the risk be increased by the erection of buildings, or by the use or occupation of neighboring premises, or otherwise, or if, for any other cause, the company shall so elect, it shall be optional with the company to terminate the insurance after notice given to the assured or his representative of their intention to do so; in which case the company shall refund a ratable proportion of the premium." The latter condition it is not material to notice, as the policy is unaffected thereby until the company elect to interfere and put an end to it on the happening of any or either of the events provided against; and as it respects the former, the judge charged very explicitly in relation thereto.

It was insisted by the counsel for the defendants, that the erection of the new buildings on the premises of the plaintiffs adjoining the building insured, together with the alterations in the latter, in judgment of law enhanced the risk insured against, and *per se* avoided the policy; and that the learned judge, therefore, erred in submitting the question to the jury as matter of fact. There are several cases directly holding the contrary. A building may be altered so as to vary from the description in the representation, if the risk is not thereby increased, as was decided in the case of *The Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72. There the assured, in a fire policy upon a steam saw-mill, represented it to be a "wooden building about one hundred and thirty feet long by thirty feet broad." An addition was afterwards put up on the side for a boiling-house, making the building, for about forty feet of its length in the centre, forty feet broad, instead of thirty feet as was represented. It was submitted to the jury whether the risk was thereby increased, who found it was not, and gave a verdict in favor of the assured for the loss. The same doctrine was laid down and applied in the case of *Stebbins v. The Globe Ins. Co.* 2 Hall, 632, and in *Stetson v. Massachusetts Mutual Ins. Co.* 4 Mass. R. 330. See also 1

Parol Notice of Prior Insurance.

Phillips on Ins. 290. In *Stebbins v. The Globe Ins. Co.* the plaintiff had erected buildings contiguous to the one injured, upon ground vacant at the time of the insurance, and the question was left to the jury whether or not the risk was thereby materially enhanced.

As there is no express prohibition contained in the policy against the erection of additional or adjoining buildings, it is not for the court to interpolate such a condition by construction or implication, so as to avoid the contract whether the company have sustained any injury thereby or not; and especially should we not do so, when we see that the parties themselves have taken care expressly to provide against such alterations or additions as materially enhance the risk, and thereby operate to the prejudice of the company.

I think the case was properly submitted to the jury, and that we cannot consistently disturb the verdict upon the evidence before us.

New trial denied.

McEWEN & others vs. THE MONTGOMERY COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1843.)

Parol Notice of Prior Insurance.

In case a policy of fire insurance, which requires notice of prior insurance, does not provide that such notice shall be made part of the application, or that it shall be in writing, verbal notice will be sufficient. And in such case notice to a regular agent of the company given while he is engaged in the business and acting within the scope of his authority is notice to the company.

THE case is sufficiently stated in the opinion.

D. Cady, for the plaintiffs.

N. Hill, Jr., for the defendants.

By the Court, BRONSON, J. Notice of the prior insurance upon the same property was in the nature of a condition precedent, and if notice was not given, the policy was void from the beginning.

Was it necessary that the notice should be in writing? If it

¹ 5 Hill, 101.

Parol Notice of Prior Insurance.

must be given as a part of the application for insurance, then undoubtedly it must be in writing, for it is one of the conditions of insurance annexed to the policy that the application shall be made in writing. But there is nothing in the policy requiring the notice to be inserted in the application. The words are, if there be already any other insurance "not notified to this corporation," the policy shall be of no effect. Nothing is here said about the application, and although notice inserted in the application would unquestionably be good, it is evident from another part of the contract that the defendants did not themselves contemplate that mode of giving notice. They required applications for insurance to be made in writing "according to the printed forms prepared by the company." And their printed forms, which contain blanks to be filled up by the applicant, have no blank to be filled with notice of a prior insurance. But it is enough that they have not required the notice to be inserted in the application.

There is, then, nothing but a provision in general terms for a notice, without prescribing, either in terms or by necessary implication, the mode in which it should be given. In such cases verbal notice is good; unless the notice be a legal proceeding, and then it should be in writing. *Rex v. Surrey*, 5 Barn. & Ald. 539; *Gilbert v. Columbia Turnpike Co.* 3 John. Cas. 107; *Matter of Cooper*, 15 John. 533; *Miner v. Clark*, 15 Wend. 425; Id. p. 428, per Bronson, J. If the defendants intended to require a written notice, they should have said so.

Notice was given to the agent, Wilcox, and the only remaining question is, whether that was notice to the company. The general doctrine that notice to the agent is notice to the principal, is undeniable. But it is said that Wilcox is a special agent, and that his authority did not extend to receiving notice of a prior insurance. He was not retained for a single transaction, but was employed to solicit risks, and negotiate contracts for the company with anybody and everybody who might wish to insure; and as to that particular business he was a general agent. Third persons dealing with him had a right to judge of the extent of his authority from the nature and course of the business in which he was employed, without being affected by any special instructions or other limitation of his authority

Parol Notice of Prior Insurance.

which did not come to their knowledge. His appointment was not necessarily in writing, and it does not appear that the power under which he acted was communicated to the plaintiffs. But I shall lay no stress upon that fact, and will consider the case on the assumption that the written appointment of Wilcox was laid before the plaintiffs at the time the business was transacted.

To understand the extent of the agent's power, it will be proper to take some notice of the nature and course of the business in which he was engaged. These companies, for the purpose of extending their business, send out agents to solicit risks and negotiate contracts of insurance. The agent is furnished with the form of the contract which the company proposes to make, and the conditions on which it is willing to assume the hazard. He is also furnished with a blank for a written application to be filled up and subscribed by any one who may wish to insure. When such a person is found, the papers are laid before him by the agent, a survey is made, the amount of premium settled, the blank application is filled up and signed, a premium note is made, and five per centum or some other portion of the premium is paid down. The agent receives the application, note, and money, and transmits them to his principals. The company thereupon makes out a policy bearing even date with the note and application, and sends it, either directly or through the agent, to the person insured. The agent is appointed and sent out for the purpose of inviting men to insure, and encouraging them to do so by transacting the business in such a way as to save them the necessity of either going or sending to the office of the company. As to everything else which is required of the applicant, he may confessedly deal with the agent, and I think he may do so in giving notice of a prior insurance. Indeed, it seems to be necessary that the notice should be given to the agent to prevent its reaching the company too late. It must be given before the contract is completed, or else the policy is declared void. The policy is dated and takes effect from the time the business was transacted with the agent, and if notice is not given to him, it may often happen that the company will not receive it until after the date of the contract.

 Objection to Notice.

I think the company must have intended that notice of a prior insurance should be given to the agent. But it is not necessary to maintain that position. They commissioned Wilcox to negotiate contracts for them, and notice to him while he was engaged in that business and acting within the scope of his authority, was notice to his principals. And this is so whether he was a general or special agent. If I appoint an attorney to purchase a house for me, and the agent, while engaged in that business, has notice of a prior unregistered deed, my title will be affected by the notice. *Jackson v. Sharp*, 9 John. 163. The principle is a familiar one. The power under which the agent acts never provides in terms that notice may be given to him; but the notice is good, for the reason that, while acting within the scope of his authority, whether a general or special agent, he stands in the place of the principal, and persons dealing with him are for most purposes regarded as dealing with the principal.

If the defendants had provided that the notice should be made a part of the application, or that it should be made in writing, the plaintiffs could not succeed. But the defendants asked nothing but notice, and that they had through their agent. As the notice was properly given to the agent, it is of no consequence that he neglected to communicate it to the company.

New trial granted.

POTTER vs. THE ONTARIO AND LIVINGSTON MUTUAL INSURANCE
COMPANY.¹

(Supreme Court, New York, May Term, 1843.)

Objection to Notice.

If, in reply to a notice of other insurance, the company's secretary says, "We have received your notice of additional insurance," and offer no objection to it, it will be considered that the company approved of it.

When a policy requires notice of other insurance, subject to the company's approval of the same, the company has its election to continue or terminate the risk upon receipt of such notice; but the policy remains in force until notice of its termination is given.

¹ 5 Hill, 147.

Objection to Notice.

THE case is sufficiently stated in the opinion.

S. Stevens, for the plaintiff.

J. Dickson & M. T. Reynolds, for the company.

By the Court, BRONSON, J. When the plaintiff obtained further insurance upon the mill, it was his business to give notice thereof to the company, and either have the same indorsed on the policy, or otherwise acknowledged and approved by the defendants in writing. If he neglected to comply with this condition, the policy was to cease and be of no further effect. This is putting the case in the most favorable light for the defendants. The plaintiff gave notice in due time of the further insurance, and the same was acknowledged by the defendants in writing. But the notice of further insurance was to be "acknowledged and approved" by the company, and it is said that there was no approval. That may be true if we look only at the literal reading of the answer which the defendants gave to the notice. But I take the rule to be, that a writing contains all that may fairly be implied from it, and it is difficult to read the answer without inferring that the defendants meant to approve, as well as acknowledge, the notice of a further insurance. What else could the defendants have intended? They say to the plaintiff, "We have received your notice of additional insurance," and there they stop. There was no disapproval, nor was there any suggestion that the matter was reserved for future consideration. The plaintiff could not but understand from the answer that the notice — or the further insurance, if such be the true reading of the clause — was "acknowledged and approved," and that nothing further remained to be done. Let us apply Dr. Paley's rule in relation to the performance of contracts. He says: "Where the terms of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it." Now, how did the defendants apprehend at the time that the plaintiff would receive their answer? If they secretly reserved the right of approval or disapproval at a future period, could they have believed that their written answer would be so received by the plaintiff? I think not. They must have intended the plaintiff should understand from the answer that everything which was necessary

Objection to Notice.

to a continuance of the policy, and consequently that they approved, as well as acknowledged the further insurance. Let us look a little further into the contract, to see how much was intended by this provision for a notice and approval. A subsequent clause in the policy provides for a ratable apportionment of the loss between the different companies, in case of a further insurance on the same property. The primary object of the clause under consideration was, to secure a notice to the company of any other insurance, to the end that they might the more certainly have the benefit of a *pro rata* distribution in case a loss should happen. The penalty of a forfeiture of the policy was therefore imposed on the plaintiff if he should neglect to give the notice. In this view of the case the condition was performed the moment the defendants received the notice and acknowledged the same in writing. But there is another feature in the case which shows that something more than a notice was intended. . . . The defendants refused to insure to the amount of more than two thirds of the value of the property, and thus left the applicant to stand his own insurer as to the remaining third. This was calculated to secure care and watchfulness on his part; and by the word "approved," the defendants intended to reserve the right of putting an end to the policy in case of any further insurance. When the notice was received, they had an election to continue or terminate their risk. They were at liberty to say, "This policy shall cease and be of no further effect," or they might allow the risk to continue.

But the company had nothing more than the right of election. They could not continue to take the fruits of the contract without incurring the hazard; and if they intended to terminate the policy, the plaintiff was entitled to know it, to the end that he might cause himself to be insured in some other quarter. Now what was done? The defendants had all the facts before them, and could as well decide the question in an hour as in a month. They say to the plaintiff, "We have received your notice of additional insurance." Nothing was said about putting an end to the contract, nor was there any intimation that the question was reserved for future consideration. The plaintiff would reasonably infer from such an answer that the defendants had elected to continue the risk, and they had no right to leave him

Objection to Notice.

under that impression until after a loss had happened, and then say to him that their election had not been made. Honesty and fair dealing forbid it. It was said in argument that the secretary had no power to approve or make an election for the company in this matter. That may be so. But he was the proper organ of the company for the purpose of communicating their determination to the plaintiff. It is not necessary to consider his letter as the act of approval or election; but only as the evidence that the company had acted. There can be no doubt that the letter was sufficient evidence of that fact, and I have therefore treated the words of the secretary as being the language of the company.

But let it be granted that the defendants have never elected to continue the policy, and how will the case stand? They certainly have never elected to put an end to it. Making further insurance did not work a forfeiture of the policy unless the plaintiff neglected to give notice "with all reasonable diligence," and there is no pretence of any such neglect. On receiving notice, it was for the defendants to say whether the contract should terminate or not; and until they made the election the policy continued in force. This is, I think, the reasonable construction of the contract, and if that be so, there is no longer any difficulty in the case. The policy was in full force at the time the loss happened and the cause of action accrued. Indeed, it is in full force still. All other questions made upon the trial were decided in the plaintiff's favor at the circuit. If the judge had intimated a different opinion, the case would have been open to further explanation. We do not therefore go beyond the point on which the nonsuit was ordered.

New trial granted.

See *Miller v. Eagle Life & Health Ins. Co.* 1 Bosw. 338; *S. C.* 1 *Life & Co.* 2 E. D. Smith, 268; *S. C.* 1 *Life & Ac. Ins. R.* 455; *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405, 413 (1865).
Ac. Ins. R. 375; *Peacock v. New York Life*

 Concealment. — Disclosure of Buildings.

BURRITT vs. THE SARATOGA COUNTY MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1843.)

Concealment. — Disclosure of Buildings.

The conditions annexed to a policy issued by a mutual insurance company, after providing that all applications for insurance should be in writing according to the printed forms prepared by the company, further provided that the application should state the relative situation of the building insured in respect to all other buildings standing within ten rods, and that any misrepresentation or concealment in the application should render the policy void. The printed form of application prepared by the company and used by the assured, contained a note in the margin thus: "Relative situation as to other buildings, distance from each, if less than ten rods;" and in the blank opposite to this, the assured inserted a description of five buildings which stood within the distance specified, but omitted to mention several others standing within the same distance. *Held*, that the omission, however innocent, was fatal to the policy; and this, whether material to the risk or not.

ASSUMPSIT on a policy of insurance, tried before Monell, C. J., at the Tomkins circuit, in September, 1842. On the 19th of December, 1837, the defendants insured the plaintiff, Joseph Burritt, against loss or damage by fire "on his store situate in the village of Ithaca, \$1,600; reference being had to the application of said Joseph Burritt for a more particular description, and as forming a part of this policy, during the term of five years." Annexed to the policy were "Conditions of insurance," as follows, viz.: 1. "All applications for insurance must be made in writing, according to the printed forms prepared by the company. Such application shall contain the place where the property is situated [and, among other things], its relative situation as to other buildings; distance from each, if less than ten rods; for what purpose occupied," &c.; 2. "Such application may be made either by the applicant or by a surveyor, and in all cases the insured will be bound by the application, for the purpose of taking which, such surveyor will be deemed the agent of the applicant;" 6. "If any person insuring any property in this company shall make any misrepresentation or concealment in the application, &c., such insurance shall be void and of no effect." The printed forms of applica-

¹ 5 Hill, 188.

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tions prepared by the company contained a marginal note as follows: "Relative situation as to other buildings — distance from each, if less than ten rods;" at the right hand of which note was a blank to be filled up by the applicant. This blank the plaintiff filled in his application with the description of five buildings as standing within ten rods from the building insured. Several other buildings, and among the number a cabinet-maker's shop, all standing within the ten rods, were not mentioned in the application. The plaintiff's store was an ordinary hazard, and the rate of premium was 15 per cent. The rate for a cabinet-maker's shop was from 25 to 30 per cent. On the 28th of May, 1840, a fire commenced in the cabinet-maker's shop, which communicated to the plaintiff's store and damaged it to the amount of \$850; and for that loss this action was brought. The judge charged the jury in relation to the survey or application, that "it did not amount to a warranty; that there must be evidence to the jury (which is disclaimed in this cause) of fraudulent misrepresentation, or fraudulent concealment of facts. That an accidental omission to insert in the application (without fraud) a building within the ten rods did not make void the policy; and, therefore, that the mere omission to insert the cabinet shop, under the facts of this case, where fraud is disclaimed, did not avoid the policy." The jury found a verdict for the plaintiff, and the defendants now moved for a new trial on a bill of exceptions.

D. Wright & J. A. Spencer, for the defendants.

B. Johnson, for the plaintiff.

By the Court, BRONSON, J. In the law of insurance a representation is not a part of the contract but is collateral to it. An express warranty is always a part of the contract, and a reference in the policy to a survey or other paper will not make such paper a part of the contract, so as to change what would otherwise be a mere representation into a warranty. *Jefferson Ins. Co v. Cotheal*, 7 Wend. 72; *Snyder v. Farmers' Ins. Co.* 13 Wend. 92, and *S. C.* in error, 16 Wend. 481; *Delonguemare v. Tradesman's Ins. Co.* 2 Hall, 589; 1 Marsh. Ins. (Condy) 346-350, 451; 1 Phil. Ins. 346, 347, ed. of 1840. But these cases admit, what no one could well deny, that the policy may so speak of another writing as to make it a part of the contract,

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although not actually embodied in the policy. And to that effect see *Roulledge v. Burrell*, 1 H. Black. 254; *Worsley v. Wood*, 6 T. R. 710; *Roberts v. Chenango Ins. Co.* 3 Hill, 501. Now here, the policy not only refers to the plaintiff's written application "for a more particular description" of the property insured, but it refers to it "as forming a part of this policy." The application was thus, by express words, made part and parcel of the contract, and the two instruments must be read in the same manner as though they had been actually moulded into one.

How then stands the question of warranty? The plaintiff was required by the "conditions of insurance," and by the form of application with which he was furnished, to state the "relative situation [of the store] as to other buildings — distance from each, if less than ten rods." To this he answered by mentioning five buildings as standing within ten rods. Although he did not in terms say there was no other building within the ten rods, he must have intended that his answer should be received and understood by the company as affirming that fact; and as the answer is to be regarded as parcel of the contract, I find it difficult to resist the conclusion that the plaintiff has agreed that there were no other buildings within the ten rods than those mentioned in the application. Men are not at liberty to put a different construction upon their language when the contract is to be enforced, from that in which they intended the words should be received by the other party at the time the contract was made. I am strongly inclined to the opinion that there was a warranty; but there is another feature in the case which renders it unnecessary to settle that question.

In marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined, or would have made upon different terms. Although no fraud was intended by the assured, it is nevertheless a fraud upon the underwriter, and avoids the policy. *Bridges v. Hunter*, 1 Maul. & Selw. 15; *Macdowall v. Fraser*,

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Doug. 260; *Fitzherbert v. Mather*, 1 T. R. 12; *Carter v. Boehm*, 3 Burr. 1905; *Bufe v. Turner*, 6 Taunt. 338; *Curry v. Commonwealth Ins. Co.* 10 Pick. 535; *N. Y. Bowery Ins. Co. v. N. Y. Fire Ins. Co.* 17 Wend. 359; 1 Marsh. Ins. (Condy) 451-453, 465; 1 Phil. Ins. 214, 303. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk. See 1 Phil. Ins. 284, 285, ed. of 1840. It is not necessary, for the purpose of avoiding the policy, to show that any fraud was intended. It is enough that information material to the risk was required and withheld.

This doctrine is fatal to the present action. The plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods; and he omitted to mention several buildings which stood within that distance, and among the number was one which was far more hazardous than that to which the policy applied. If there could be any doubt that the facts concealed were material to the risk, the question should have been left to the jury.

But there is a further view of the case which is still more decisive against the action; and it is one in which the materiality of the concealment is not open for discussion. The plaintiff

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was required by the conditions annexed to the policy, and by the printed form of application which he used, to give the information which he withheld.

And it was one of the "conditions of insurance" that if he should "make any misrepresentation or concealment in the application" the policy should be "void, and of no effect." Nothing is said about fraud; but any concealment in the application avoids the policy. And yet the jury was instructed that there must be a fraudulent concealment of facts. That position cannot be maintained without making a new contract for the parties.

A warranty by the assured in relation to the existence of a particular fact must be strictly true, or the policy will not take effect; and this is so whether the thing warranted be material to the risk or not. It would, perhaps, be more proper to say, that the parties have agreed on the materiality of the thing warranted, and that the agreement precludes all inquiry on the subject. See the cases already cited, and *Fowler v. Aetna Ins. Co.* 6 Cowen, 673, and 7 Wend. 270, *S. C.*; 1 Phil. Ins. 351, 354. Here the parties have by their contract placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty. They have agreed that the misrepresentation or concealment shall avoid the policy, and we have nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk. The jury should have been instructed to find a verdict for the defendants.

The CHIEF JUSTICE and COWEN J., being members of the company, gave no opinion. *New trial granted.*

See *Dennison v. Thomaston Mut. Ins. Co.*, 122, *post*; *Chaffee v. Cattaraugus County ante*, p. 87, and cases cited; *French v. Mut. Ins. Co.* 18 N. Y. 376 (1858). *Chenango County Mut. Ins. Co.* 7 Hill,

Double Insurance.

THE HOWARD INSURANCE COMPANY OF NEW YORK *vs.* SCRIBNER
& others.¹

(Supreme Court, New York, May Term, 1843.)

Double Insurance.

Double insurance occurs only when the second insurance is upon the same property precisely as that covered by the first. Therefore, in the case of an insurance in the sum of \$1,000 on fixtures, and \$3,000 on stock, and another insurance of \$5,000 on fixtures and stock as one parcel, a double insurance has not been effected.

The amount of recovery on the first policy in such case held not to be affected by the existence of the second policy.

THE case is stated in the opinion.

M. T. Reynolds, for the plaintiffs.

W. C. Noyes, for the defendants.

By the Court, COWEN, J. The defendants' policy was on buildings described and insured as two distinct parcels, about which there is no dispute. By the same policy they insured \$1,000 on fixtures and utensils, and \$3,000 on stock. The *Ætna* Company subsequently insured \$5,000 on the fixtures and stock as one parcel. Out of fixtures worth \$9,894.91, the plaintiffs lost \$5,918.76; and out of stock worth \$2,996.35, they lost \$2,684.01.

The defendants' policy contained a clause in these words: "And in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy, the insured shall not in case of loss or damage be entitled to demand or recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured upon said property." The *Ætna* policy contained a clause to the same effect.

Were this the ordinary case of double insurance, no question is made that the plaintiffs' recovery should have been cut down to a proportional amount. *Lucas v. Jefferson Insurance Company*, 6 Cowen, 635. A man may insure the same subject against fire in several offices, to any amount, due notice being given to each, and the fact noted on the respective policies. 1 Bell's Com. 629; 2 Phill. on Ins. 59, 2d ed. The effect is,

¹ 5 Hill, 298.

Double Insurance.

that each office then stands in the relation of co-surety with the other, according to the several amounts for which they undertook, just as if they had all underwritten the same policy. The several policies are considered as one. Stopping here, therefore, the insured may sue and recover on one or more of them to the extent of his entire loss, if the sums subscribed will cover it, and those who pay the loss may compel contribution for the payment from the others, in the proportion that each of the sums subscribed by them bears to the whole amount of subscriptions. 6 Cowen, 635; 2 Phill. on Ins. 606. See Hughes on Ins. 45; Millar on Ins. 271, 272; Park on Ins. 373; Condry's Marsh. 146. To avoid this circuity, the clause in question was introduced.

By this, the double recovery and contribution is performed in a single action; the defendant being allowed to recoup the same amount which he must formerly have recovered over against those who stood by his side. The clause, it seems, has not always been received with perfect favor. *Stacey v. The Franklin Ins. Co.* 2 Watts & Serg. 506, 542.¹ But no question has ever been made that this and the like clauses in policies must have effect, when the case for which they provide clearly exists. Parties to a contract may fix damages for a breach, by a provision in the contract itself, if the measure prescribed violate no rule of policy or equity. The clause in question was probably intended to substitute proportional abatement for contribution, in all those cases in which the latter would otherwise have been required by the common law: and is perhaps sufficient to answer that end. Have we here that single policy, that relation of sureties which calls for contribution? The sums subscribed may be and often are different; but none of the numerous books cited show that the right to contribution has ever been supposed to arise without the subject matter insured being exactly the same in each policy. It is not enough that the insured be the same. He may take policies on different things, on different risks pertaining to the same thing, or on different interests in respect to the same thing. In each case the demand for a loss against one insurer is in no way affected by the subscription of another. *Godin v. London Ass. Co.*

¹ *Ante*, p. 108.

Double Insurance.

1 Burr. 489, 495; 1 W. Bl. 103, 105, S. C.; Park. on Ins. 375. We must here regard the first as in effect two separate policies insuring \$1,000 on the fixtures and \$3,000 on the stock. Then, to warrant contribution, we want two separate policies, or one insuring separate sums on each. The assured, however, took only one policy, insuring an entire sum on one parcel. The subject was therefore different. In the first it was separate, in the second, compound; and such a difference may as well be extended to fifty as to only two subjects. The several subjects are found to be substantially different when an effort is made to effect contribution. The counsel for both parties agree, that in order to do so, the \$5,000 must be divided into two parts, one being applied to the fixtures and the other to the stock. It is not denied that the division must be entirely arbitrary; and the different methods proposed by the parties best accord with their respective interests. Neither has cited any case where such a thing has been done, nor mentioned any principle by which we should be authorized thus to modify the contracts of parties. Something like it was, I perceive, once attempted by a private hand, and with about the same success as has attended the efforts of counsel here. Stevens on Average, 194, Am. ed. of 1817. The struggle of the learned author was to make at least a single indemnity out of both policies; and anything short of indemnity would not be just to the assured. If we were authorized to impute fraud or evasion to the assured, we might then allow the defendants to divide and apply the sum in their own way. But the policy from which they claim to benefit, was noted on their own, and they admit that due notice was given to them. They have acquiesced, either knowing of the variance, or at least neglecting to obtain proper information and to take measures for having it corrected or explained. The plaintiffs evidently intended to insure only the balance of an interest which they thought was not covered by the defendants' insurance — an insurance that proves in fact unequal to the loss. Possibly the second policy may, under the circumstances, be so construed as to effect the intended object; but how much may be recovered upon the *Ætna* policy is not the question. It is enough to see that the insurance is not double. The case of *Harris v. The Ohio Insurance Company*, 5 Ham. 466, 468,

Policy. — Construction — Ambiguity. — Oral Evidence.

did not raise the question of contribution or abatement. The first policy was declared void, because notice of the second was not given. It comes out in the course of the opinion that one was on goods, and the other on store and goods; but the latter might have been for separate sums on each.

We are of opinion that the court below was right in holding that the plaintiffs might recover on the defendants' policy without reference to the *Ætna* policy. *Judgment affirmed.*

SIR JOHN HARE & others vs. BARSTOW & others.¹

(Queen's Bench, Trinity Term, 1843.)

Policy. — Construction. — Ambiguity. — Oral Evidence.

A policy of insurance mentioned a building, oil-mill, of one floor only, with stone and tile, occupied by ———, for crushing of linseed and grinding of dyewood, but no refining of oil therein, £1,000; on fixed machinery and millwright works, including all the standing and growing gear therein, £1,000; one engine-house adjoining the mill, £200; one steam-engine therein, £300; one logwood warehouse, in which chopping dyewood is performed, communicating with the mill, £200; one warehouse on the other side of the mill, to the east side, merely for the stowing of goods, £300. *Held*, that there was no ambiguity in the policy, and that evidence was not receivable to show that it was intended to insure the machinery and gear in the logwood warehouse.

ACTION on a policy of insurance upon an "oil-mill and millwrights' gear therein," "including all standing and growing gear therein," "on fixed machinery, and millwrights' work therein," against the defendants, as directors of the Yorkshire Life & Fire Insurance Company. Plea, after payment of £276 into court, that the plaintiffs had sustained no damages to a greater amount. At the trial before Lord Denman, C. J., at the London sittings after Michaelmas term, 1842, it appeared that the action was brought to recover £495 12s. The premises of the plaintiffs generally went by the name of the mill or oil-mill belonging to the plaintiffs; but they were divided into several parts — a warehouse, engine-house, and boiler, and a place where logwood was ground; the plaintiffs being grinders of logwood as well as crushers of oil. The machinery was moved

¹ 8 Jurist, 928.

by a steam-engine in the engine-house — all on the ground floor. The whole of the first floor above was used as a store-room. There was one entire roof, and there were four walls inclosing the whole premises. The stat. 9 Geo. 4, c. 13, requires the insurance to be effected in the manner pursued by the plaintiffs. The agent of the defendants had looked over the whole of the premises before the insurance was effected, and had altered the form of the original proposal. The logwood-house was partially burnt, and the machinery therein damaged. In a letter, dated the 6th January, 1841, the plaintiffs claimed £452 12s. for damages sustained in the dyewood mill, &c. The value of the machinery was stated in the policy to be £1,000. For the purpose of showing that the whole mill was meant to be insured, evidence was given of the original proposal, and of the value of the machinery in the warehouse, which was objected to on behalf of the defendants. The chief justice stated to the jury, that the question was whether the machinery and gear in the logwood mill was insured or not. He considered them as distinct houses, but left to the jury the question what was the intention of the parties, and also whether it was one entire building, or two separate and distinct buildings. A verdict was given for the plaintiffs for £250, with leave to move for a nonsuit, on the ground that there was no question for the jury. In the following term (January 13, 1843), a rule *nisi* was moved for accordingly, and for a new trial, on the ground of the improper reception of evidence, by

Sir F. Pollock, A. G. First, the question is, whether the policy applied to certain premises described, so as to limit the amount recoverable. The construction of the policy is for the court. Secondly, the value of the subject matter, or the amount of the premium, cannot be given in evidence for the purpose of construing a contract in writing. [Lord DENMAN, C. J., referred to *Doe d. Sewell v. Parratt*, 3 B. & Adol. 469]. *Rule nisi*.

In Hilary term (January 12),

Erle & Cleasby were heard against the rule. The term "oil-mill" is capable of two meanings: either a common mill for grinding dyewood and for crushing linseed, or, in its more proper sense, for crushing linseed only. Then it was a ques-

tion for the jury, what the description of the property in the policy included, according to the intention of the parties, at the time of entering into it. It is a question of fact — like parcel or no parcel. The evidence of the value of the machinery was admissible as an item of description. The document itself is the best evidence; but when something *dehors* the document shows an ambiguity in it, evidence is admissible not to vary the terms, but to explain what the parties meant.

Sir *F. Pollock*, A. G., *Hoggins & T. P. Price*, in support of the rule. Under the stat. 9 Geo. 4, c. 13, an insurance company is bound to make a division of risks where there are distinct buildings. This statute was acted upon both by the plaintiffs and the defendants. It was admitted that the plaintiffs carried on two distinct branches of business, crushing linseed and grinding dyewood, though the machinery for both purposes was worked by one engine. The building consisted of four parts, and they are all described in the policy; there is no latent ambiguity, nor any question of fact for the jury. Upon the construction of the policy, which is for the court, it must hold that the machinery in the logwood warehouse was not included in the insurance. *Rickman v. Carstairs*, 5 B. & Adol. 662, was cited.

Cur. adv. vult.

In Trinity term (June 10),

Lord DENMAN, C. J., delivered the judgment of the court. This was an action on a policy of insurance against fire. The subject of insurance mentioned was a building, oil-mill, of one floor only, with stone and tile, occupied by a person named —, for crushing of linseed and grinding of dyewood, but no refining of oil therein, £1,000; on fixed machinery and millwright works, including all the standing and growing gear therein, £1,000; an engine-house adjoining the mill, £200; a steam-engine therein, £300; a logwood-house, in which chopping dyewoods is performed, communicating with the mill, £200; a warehouse on the other side of the mill, to the east side, merely for the storing of goods, £300; warranted to be in conformity with the description lodged at the office. By this description of the parcels, the mill appears to be but an apartment, in common parlance, of the building, adjoining the en-

gine-house, and communicating with the logwood warehouse, both these being parts of the mill. The defendants (an insurance company) paid a sum of money into court, and denied any damage ultra. The plaintiffs claimed more on the ground that the machinery and gear in the logwood warehouse were insured as tackle and fixed machinery therein. It was argued that there was a latent ambiguity in the policy, which might be explained by evidence, and the evidence was received (subject to a motion for a nonsuit) to show that, under the description in the policy, the whole mill was meant to be insured; whence it would follow, that the plaintiffs would recover. The plaintiffs accordingly proved their proposal to insure their oil-mill, which gave all the particulars required by the office's printed form to be described. In this, the mill is mentioned only twice, and both times in such a manner as to be most consistent with the idea of the whole building being proposed. The proposal speaks of one warehouse, and of £500 as the sum to be insured upon it. The company's agent altered that by dividing the warehouse into two; the logwood warehouse, £200; and the warehouse on the other side of the mill, £300. No explanation was given of the change from these few particulars to the full enumeration contained in the policy, which, in the expanded form, was handed to the plaintiffs by the agent, indorsed as usual: "Please to read this policy, and if not filled up according to your intention, return the same to the office for alteration;" and the plaintiffs never did return it. These facts were proved. The state of the premises appears to be such, that the plaintiffs, in first speaking of the mill, could hardly have doubted they insured the whole building by that name; but on the important question whether the evidence was receivable to explain the policy, upon which we have heard much argument, and have felt considerable doubt, we have come to the conclusion, on a careful perusal of the policy taken by itself, as it must be, and not compared with the evidence, that no real ambiguity of any sort can be found in it. The mill there described is evidently but one apartment in the building, and no machinery in any other apartment is mentioned. It follows, in pursuance of the leave reserved, that a nonsuit must be entered.

Rule absolute for entering a nonsuit.

Lightning.

KENNISTON vs. THE MERRIMACK COUNTY MUTUAL INSURANCE COMPANY.¹

(Superior Court, New Hampshire, December Term, 1843.)

Lightning.

Damage caused solely by lightning is not covered by an insurance of the property damaged against losses "by fire," or "by reason or by means of fire."

ASSUMPSIT on a policy of insurance duly executed. The act creating the defendant corporation (approved July 1, 1825), sect. 1, constitutes certain persons a body politic, "for the purpose of insuring their respective dwelling-houses, with their contents, against loss or damage by fire, whether the same shall happen by accident, lightning, or by any other means," excepting in case of design, invasion, or insurrection.

The terms of the policy sued on were to pay, "within three months next after the said property shall be burnt, destroyed, or demolished by, or by reason or by means of fire;" and farther, if any part rebuilt, repaired, &c., to the amount of the policy, "shall happen to be injured by means of fire, such damages shall be made good, according to the estimate thereof, or repaired and put in as good condition as the same was before the said fire happened."

The plaintiff claims an indemnity as for a partial loss on his dwelling-house and its contents.

To sustain his claim the plaintiff offered evidence tending to show that on a certain day his house was struck by lightning, and different parts of it materially injured, and also articles of crockery, glass, and tin ware broken or destroyed. His witnesses also testified that the boards and timber near one of the windows where the lightning struck, exhibited marks or traces of fire, being discolored and rendered of a dark brown color, as if affected by a blaze of fire. One witness testified that he saw on these boards and timbers where fire burned, and he had no doubt that the house would have been burned had not the water been admitted through the window, which was broken out by the lightning.

¹ 14 N. Hamp., 341.

The only question made by the defendant was, whether the loss was covered by the policy or act of incorporation; and the court being of the opinion that it was, a verdict was ordered to be taken for the plaintiff, subject to be affirmed or set aside and a verdict entered for the defendant, as the opinion of this court might be on the case stated.

PARKER, C. J. There must be a new trial. On the facts stated, the court cannot determine whether the loss is or is not within the risks of the policy. If the damage was from lightning without any combustion, it is clearly not within the terms of the contract of insurance. The policy does not provide against every damage which may arise from the action of the electric fluid. The charter of the insurance company, indeed, refers to lightning, but it is only to authorize the defendant to insure against losses by fire which "shall happen by lightning." This is a very different thing from direct losses by lightning, both as regards their origin, nature, predisposing causes, development, and effects, and in reference to the possible application of means to prevent and to limit the damage.

The terms of the policy, too, were to pay within a certain time after the destruction "by reason or by means of fire." Fire is the one loss insured against, and lightning, though not excepted from the sources of fire, is nowhere, either in the charter or policy itself, directly provided against. It is true that there was evidence tending to show that the building, insured in the policy now in question, was set on fire by the lightning; and if such was the fact, this action is well brought. But this fact is not made certain by the evidence, and the question must be submitted to a jury.

ARCTUS TRUMBULL & others vs. THE PORTAGE COUNTY MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Ohio, December Term, 1843.)

Insurable Interest. — Alienation. — Executory Contract.

A mere contract to convey the property insured, at a future day, before which time it is burned, is not a loss of the insurable interest, or an alienation of the property.

¹ 12 Ohio, 305.

THIS was an action of covenant* from Portage county, upon a policy of insurance, and was submitted to the court upon the following agreed statement of facts:—

“In this case it is admitted that the policy of insurance issued to Luther Trumbull, and that the loss occurred as stated in the declaration. That said loss occurred on the 22d day of February, 1843, and the requisite steps were immediately taken by the plaintiffs to notify and charge the insurers; that all requisite proofs can be made by the plaintiffs, and that they are entitled to recover the amount named in the policy, as insured, upon the buildings and machinery, with interest from the first day of June, 1843, unless the contract entered into by the plaintiffs, with Robert Wilson, deprive them of the right to recover to this extent. It is further agreed that the stock and machinery were about of equal value, fifteen hundred dollars each. It is admitted that Lucy Trumbull is the widow of said Luther Trumbull, and that the plaintiffs are his heirs at law. That, on the 23d day of January, 1843, a contract was entered into with said Robert Wilson, by the plaintiffs, for the sale, to him, of a certain tract of land, upon which the insured premises were situated, but that said premises remained in the possession of the plaintiffs up to the time of the fire. It is further agreed, that said Wilson is still living, but has paid nothing upon said contract, and has done nothing towards its fulfilment. That if the plaintiffs shall not recover more than two hundred dollars, with interest from the first day of June, aforesaid, they shall not recover costs.”

Peter Hitchcock, R. Hitchcock, and Wilder, for plaintiffs.

E. Wade, for defendants.

BIRCHARD, J. This case turns mainly on the question, whether the plaintiffs had an insurable interest in the premises insured at the time the loss occurred.

From the facts stated in the agreed case, it appears that they had. The legal title was in them, coupled with an equity equal to the full value of the premises, that is, a lien for all the purchase money, and they were in possession. They had entered into a contract to convey at a future day. At law, this contract did not transfer any right in the land; and in equity, the purchaser can only enforce a transfer after he shall have laid a proper basis by paying the purchase money.

Attachment in Execution.

This being the case, there was no alienation of the property which renders the defence of a want of interest in the thing insured, valid. The plaintiffs have sustained a loss, covered by the policy, and it is equal to the amount insured. It is said, however, that inasmuch as the premises insured were pledged for the payment of the premium note, the contract to sell avoided the policy by impairing the lien of the company. We cannot admit this. If the lien of the defendants is a legal one, the contract with Wilson certainly does not defeat or impair it; if only an equitable lien, it is equally certain that it is elder, and, therefore, better than the equity of Wilson growing out of the contract.

It is supposed that questions might be raised as between the parties and Wilson; especially should Wilson pay up the purchase money, and demand a specific performance; but it will be sufficient to determine them when they come before us.

Judgment for the plaintiffs.

BOYLE vs. FRANKLIN FIRE INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, March Term, 1844.)

Attachment in Execution.

A loss incurred on a fire insurance policy, the amount of which is fixed by the award of persons mutually chosen by the insured and insurer, may be levied on by attachment in execution as a debt due to the insured.

ERROR to the district court for the city and county of Philadelphia.

The plaintiff, William V. Boyle, obtained a judgment in that court against Robert Woods & Brother, in September, 1842, for \$139.41. He then issued an attachment in execution, and levied it in the hands of the Franklin Fire Insurance Company. They answered interrogatories and pleaded *nulla bona*, and on the trial a verdict and judgment were given in their favor.

¹ 7 Watts & S. 76.

Attachment in Execution.

The answer of the company set forth that on the 10th January, 1842, they made insurance for Robert Woods & Brother of a stock of groceries contained in their store, No. 450 North Front Street, to the amount or value of \$5,850, and on fixtures thereon \$150, together \$6,000, for the term of one year, as will more fully appear by the policy of insurance hereto annexed. Information having been given to the respondents that a fire had taken place upon the premises on the 12th day of March last, two persons, viz., Morris Patterson and Jonathan Patterson, were indifferently chosen arbitrators, in pursuance of the provision of the said policy, to estimate the damage or loss to the said goods by the said fire. The said arbitrators made an award in writing dated the 13th day of June, 1842, as follows viz. : —

“Messrs. R. Woods & Brother v. Franklin Insurance Co. Appraisement of goods damaged by fire, 450 North Front Street. (Then followed a list of articles, &c., the appraisement concluding as follows :)

“Award of the appraisers taken from the best evidence offered them, viz., the examination of the premises after the fire, the bills of merchandise purchased, the evidence of those employed, &c.

Amount of appraisement	\$2,718.14
Less value damaged goods	838.12
Balance	\$1,880.02

MORRIS PATTERSON, } Appraisers.
JON. PATTERSON, }

June 13th, 1842.”

Annexed to which award was a list or statement of teas alleged by the insured to have been on the premises at the time of the fire, in respect to which the appraisers reported as follows, viz. : —

“Of the above invoice of teas a portion of them remains, being found by the appraisers on the premises. A difference of opinion arose between the two first appointed appraisers as to the justice of including them in the appraisement of goods damaged or destroyed. In consequence, a third person was called in to decide the question, who gave it as his opinion that there was not sufficient evidence to warrant the appraisers in including all the teas in the general account, although all agree that

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some portion of said teas should be allowed the insured. We herewith submit the evidence in relation to the teas.

MORRIS PATTERSON, } Appraisers.
JNO. PATTERSON, }

"June 13th, 1842."

"I agree with the appraisers in the above award.

JOHN TRUCK."

Which sum of \$1,880.02, so as above awarded, together with the amount insured on the fixtures, and a reasonable and sufficient allowance for any loss that may have been sustained by the insured in respect to the invoice of teas aforesaid, the respondents have ever since the date of the said award been ready and willing to pay over to the person or persons entitled to receive the sum. And the respondents, further answering, say that on the 8th day of September last a writ of summons in covenant out of this court, returnable on the first Monday in October, 1842, was served upon them, and that since the service of the said summons, certain writs of attachment in execution founded upon judgments obtained against the said Woods & Brother have been served upon them, the name of the plaintiff and date of service in which are as follows, viz. :—

D. C. 1842, September 28th.	William W. Boyle . . .	\$139.41
C. P. " October 22d.	C. Cheeseborough . . .	46.12
D. C. " " 22d.	Wm. N. Woods . . .	2,131.77
C. P. " " 22d.	Comm. N. Liberties . . .	21.00
D. C. " " 25th.	David Rankin . . .	1,205.96
D. C. " November 3d.	Wm. Taylor & Co. . . .	158.00

That they have in their foregoing answer to the first interrogatory stated the amount of the appraisement of the goods alleged to have been lost or destroyed by fire in the store of Woods & Brother, and for which they, the respondents, are alleged to be liable as insurers, and they further answer that they are not otherwise indebted to them as far as they know or believe.

The amount for which they are liable is payable on demand by the person or persons entitled to receive the same, subject to such deduction for their counsel fees and expenses in the several attachments in execution issued against them as aforesaid,

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as may be suitable and proper ; which said counsel fees and expenses they claim to retain out of the said fund.

That they have had no business transaction with the defendants other than what they have stated and set forth fully, and excepting an insurance on a stock of groceries in a store corner of Fourth Street and Poplar Lane, upon which there has been no loss. And the respondents being advised that the amount payable by them upon the said policy of insurance may not in law be subject to an attachment in execution, submit the same to the judgment of the court, and pray that they may have the benefit of the objection, as if they had suggested the same by plea on exception to further answer.

On the trial the plaintiff read in evidence the interrogatories and the answers of the garnishees. The defendant offered no evidence. The judge charged the jury, that upon the facts the plaintiff was not entitled to a verdict, inasmuch as no debt appeared thereby to be due according to the proper construction of the act of assembly relating to attachments of execution.

Errors assigned: In charging the jury that the garnishees did not disclose the existence of such a debt as could be attached.

In charging that the answer did not show any such debt as could be attached according to the proper construction of the act of assembly relating to attachments of execution.

St. G. Campbell, for the plaintiff in error.

Cadwalader & T. I. Wharton, contra.

The opinion of the court was delivered by

KENNEDY, J. It is unnecessary to decide in this case whether, if the claim by Woods & Brother against the Franklin Insurance Company had not been ascertained and made certain as to its amount, it could have been attached under process sued out on the judgment which the plaintiff, Boyle, had obtained against Woods & Brother, seeing it was ascertained and rendered certain by the answer of arbitrators mutually chosen for that purpose by and between them and the Franklin Insurance Company. By the answers of the company, it appears that the amount of the claim which Woods & Brother have against them under the policy of insurance has been duly fixed by arbi-

Assignment of Policy. — Prior Insurance.

trators chosen by the parties for that purpose, in pursuance of a provision contained in the policy to that effect, and that they are willing to pay the same to those entitled to receive it, whoever they may be. The claim of Woods & Brother being thus liquidated and rendered certain, is as clearly and properly the subject of attachment as if it were a specific sum due upon a bond given by the company to Woods & Brother, which it is admitted by the counsel for the defendants would be attachable. *Judgment reversed and venire de novo awarded.*

JOHN W. LEAVITT & others, Trustees of GEORGE G. HENRY,
vs. THE WESTERN MARINE AND FIRE INSURANCE COMPANY.¹

(Supreme Court, Lewiston, March 1844.)

Assignment of Policy. — Prior Insurance.

Policies of insurance against fire are personal contracts with the assured, and do not pass to an assignee or purchaser without the consent of the insurers. The transfer of the policy by consent is equivalent to a new contract of insurance with the transferee.

When a policy of insurance provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in, or indorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been assigned and to whom the policy was transferred with the assent of the insurers, fails to notify the latter at the time of the transfer of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance made after the loss, in compliance with a condition of the policy requiring all persons insured sustaining any loss, to declare on oath whether any and what other insurance has been made on the same property, will be too late.

APPEAL from the Commercial Court of New Orleans,
Watts, J.

L. C. Duncan, for the appellants, cited 8 Johnson, 245; 11 Ibid. 265; 6 Cowen, 404; 4 Dallas, 350; 2 Phillips on Ins. 350.

Eustis, on the same side.

Maybin & Grymes, for the defendants.

MORPHY, J. This is an action brought upon a policy of insurance against fire, executed by the defendants on the 25th of

¹ 7 Robinson, 351.

Assignment of Policy. — Prior Insurance.

June, 1839, in favor of Viles & Co., of New Orleans, but admitted to have been made for the account of George G. Henry, on a house, stable, and furniture, at Mobile. The policy was for one year, and insured \$8,000 on the house, \$500 on the stable, and \$1,500 on the furniture. On the 17th of September, 1839, Henry being in New York, made an assignment of property to the petitioners, in trust for his creditors, which assignment included the insured premises. On the 27th of the same month, the trustee effected an insurance on the same house for \$8,500, for one month from the 17th, the day of the assignment of the property to them, in the office of the North American Insurance Company at New York. Viles & Co., in pursuance of instructions from the plaintiffs, obtained the consent of the underwriters in New Orleans to have Henry's policy transferred to them, which transfer was accordingly made on the 7th of October. The property insured was destroyed by fire, two days after, to wit, on the 9th of October, 1839. At the time the consent of the company was obtained, and the transfer or assignment of the policy sued on was made to the trustees, no notice was given of the existence of the New York policy; and it is admitted, that the defendants had no intimation of any such policy having been taken out, until the 13th of December following. The preliminary proof required by the conditions of the policy was not regularly made, until November, 1841. The defendants paid the loss on the furniture in March, 1840, but refused to settle for that on the house and stable assigned to the plaintiffs, on the ground that they had received no notice of the insurance effected in New York on the same property. The claim of the petitioners on the New York company was submitted to the arbitration of distinguished jurists of that city, who decided that the loss should be apportioned between the two offices, according to a stipulation to that effect contained in each of the policies. Their award has been laid before us. In relation to the liability of the defendants, which it was necessary to establish to authorize this apportionment, they reason at some length on difficulties supposed to result from the policy having been made out through error in the name of Viles & Co., instead of George G. Henry, and but slightly touch on what we conceive to be the true and only difficulty in the case.

Assignment of Policy. — Prior Insurance.

The New York company having settled with the plaintiffs in compliance with this award, the latter now claim of the defendants their proportion of the loss. The defence set up is: *First*, the want of early notice of the loss, and of the preliminary proof required by the conditions of the policy; *Secondly*, the failure of the insured to give notice to the company of the New York policy, which they had taken out on the same property. We have found it unnecessary to inquire into the sufficiency of the preliminary proof, or its waiver on the part of the company, as in our opinion, the second ground of defence on which they rely, must prevail.

The policy sued on provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed on the instrument, or otherwise acknowledged by them in writing, then this insurance shall be void and of no effect; and if the insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to the corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." Policies against fire are personal contracts with the assured, and they do not pass to an assignee or purchaser, without the consent of the underwriters. Between the 17th of September, 1839, when the insured property was assigned to the plaintiffs, and the 7th of October following, when the policy was transferred to them with the approbation of the company, it did not cover the property. Had a loss occurred during that time, the defendants would clearly have been discharged. Henry could not have claimed, having parted with all his interest by the assignment; and the petitioners could not have recovered, because they were not parties to the contract of insurance. The transfer of Henry's policy to the plaintiffs, with the consent of the company, on the 7th of October, was equivalent to a new insurance, or contract with them. Before, or at the time of receiving such transfer, they were bound to notify the defendants of the prior policy made in New York, and at that time covering the property. When the assignees or trustees sent out orders to obtain a transfer of the New Or-

leans policy, which they appear to have done on the very day they had effected an insurance in New York on the same property, there was nothing to prevent them from directing their correspondents, Viles & Co., to notify the underwriters of such insurance, and to have it indorsed on the policy transferred to them. By their neglect to do this, the transfer of the policy, if viewed as a new insurance, never took effect so as to protect them from loss. If, although the policy sued on was at an end on the 17th of September, 1839, by the assignment of the property insured, it be considered as a prior policy, and the New York policy as a subsequent one, the obligation to give notice of the latter policy with reasonable diligence was the same, and they had ample time to do it between the 27th of September and the 9th of October, when the fire occurred; but no notice whatever was given until the 12th of December following. The difficulty was not in the way of a settlement with the New York company, as at the time they insured, there was no available policy in existence to be declared; and only two days elapsed between the transfer of Henry's policy in New Orleans to the plaintiffs, and the fire which destroyed the premises insured. In relation to the ninth condition of the policy, to which our attention has been called, it is clear that the declaration to be made by the insured of other insurances existing on the property is a part of the preliminary proof, and does not relate to the notice to be given of prior or subsequent policies. The insurance offices generally require it to secure themselves the means of ascertaining, after the fire, whether other insurances existed on the property. This knowledge, in most cases, they can obtain only from the insured himself. Until this declaration is made, they have a right to withhold payment; but if it appears from such declarations, when made, that other policies existed not notified to them, they can absolutely refuse to pay. This declaration cannot surely supply the notice not previously given in accordance with the conditions of the policy. These conditions are clear and explicit; by failing to comply with them the petitioners have forfeited their right to recover. 3 Robinson, 384; 1 Phillips, 420; 16 Wendell, 400; 5 Hammond's Ohio Rep. 466; 16 Peters, 510.

The present case is one of some hardship, as the plaintiffs,

no doubt, acted in good faith. Their object was clearly to effect a temporary insurance until they could obtain a transfer of the assignor's policy, or be apprised whether it was granted or refused. But they can blame only themselves, or their agents in New Orleans, as it was easy for them to comply with the conditions of the policy. If notice of a prior policy for a period of one month can be withheld, notice of a policy for one year might also be dispensed with. In the case of *Carpenter v. The Providence & Washington Insurance Company*, the supreme court of the United States, in speaking of these conditions of the policy, say: "We see no reason why, as these clauses are a known part of the stipulations of the policy, they ought not to receive a fair and reasonable interpretation, according to their terms and obvious import. The insured has no right to complain, for he assents to comply with all the stipulations on his side, in order to entitle himself to the benefit of the contract. Upon reason or principle, he has no right to ask the court to dispense with the performance of his own part of the agreement, and yet to bind the other party to obligations, which, but for those stipulations, would not have been entered into." 16 Peters, 511.¹

Judgment affirmed.

SHIRLEY vs. MUTUAL ASSURANCE SOCIETY.²

(Court of Appeals, Virginia, March, 1844.)

Membership. — Liability of Widow. — Of Heirs. — Lien.

Every owner of a present freehold estate in property which has been insured in the Mutual Assurance Society becomes a member thereof, according to the true spirit of the law and the scheme of the institution.

Where a husband insures property in the Mutual Assurance Society and dies seized, his widow takes her dower interest subject to the lien of the society; but she incurs no personal responsibility until dower is assigned her, whereby she becomes a member, and then only for such quotas and premium as accrue while she remains owner of the dower estate, with interest and damages thereon.

Two tenements, which had been insured in the Mutual Assurance Society, descend, upon the owner's death, to his heirs, and are assigned to his widow for her dower. The widow

¹ *Ante*, p. 120.

² 2 Rob. (Va.) 705.

 Membership. — Liability of Widow. — Of Heirs. — Lien.

and her second husband sell and convey her life estate. And the society has a claim for quotas accrued after the death of the first husband; some before the assignment of dower; others afterwards and before the sale of the life estate; and the rest since that sale. It has also a claim for an additional premium accrued during the purchaser's ownership. *Held*, 1. The heirs of the first husband are personally responsible for what accrued after his death, and before the assignment of dower. 2. The widow and her second husband are personally liable for what accrued after the assignment of dower and before their sale. 3. The purchaser is personally responsible for what has accrued since, and for no more. 4. The party liable for any principal money is liable for interest and damages thereon.

The Mutual Assurance Society has a lien upon property insured therein for the principal and interest due the society, but not for damages. This lien is effectual not only against the original member, but against all persons deriving ownership from him, and the property may be sold to satisfy the same. Though one party has the estate for life and another the reversion, the lien will be enforced against the tenement insured by selling the whole fee simple title thereof, and the whole of the tenement, unless from the nature of the property it be practicable and expedient to lay off a portion thereof for sale. Before directing such sale, however, the respective personal liabilities of the several parties chargeable will be ascertained. And if the tenant for life advance the amount chargeable to the reversioner, as well as what is chargeable to himself, there will be no sale of the reversion, but a lien established therein for reimbursement of the amount so advanced, with interest, to be enforced upon the falling in of the life estate.

If a sale take place, what should be the terms as to cash and credit, and how the deferred instalments should be divided.

Under what circumstances a lien upon two tenements insured may be satisfied by selling only one of them, and applying the proceeds in exoneration of the other.

THIS was a suit in the circuit court of Spottsylvania, brought by the Mutual Assurance Society against fire on buildings of the state of Virginia, against the heirs of Claiborne Wigglesworth, Lawrence Waugh, and Lavinia W., his wife, who was the widow of Wigglesworth, and Thomas Shirley, a purchaser from Waugh and wife of her life estate in two tenements insured before the death of Wigglesworth in the Mutual Assurance Society, and assigned after his death to his widow for her dower in his real estate. The society claimed \$174.97 to be due it for quotas and a small additional premium on revaluation of one of the tenements, amounting, with interest to the first of April, 1842, to \$239.02. By the decree of the circuit court it was adjudged that Shirley should pay \$239.02, with interest on the \$174.97 from the first of April, 1842, and damages at seven and one half per centum on the principal and interest. The defendants were ordered to pay the costs. And liberty was reserved to the complainants to apply to the court for further relief. Liberty was also reserved to Shirley to resort

to the court for indemnity against the other defendants, or out of the tenements, for so much as the other defendants might be liable for.

From this decree, on the petition of Shirley, an appeal was allowed.

Patton argued the cause for the appellant. The points insisted on, and the facts, so far as material, sufficiently appear from the following opinion.

BALDWIN, J. The Mutual Assurance Society is based upon the reciprocal pledges of associated owners, by which the insured property of each is bound to contribute to the security of all. The right to compensation in the event of loss, and the duty of contributing for losses of others, arise out of the fact of ownership. Without ownership there can be no membership, and membership ceases upon the cessation of ownership. Property, however, once pledged continues to be so until destroyed, or lawfully withdrawn; and gives to its successive owners the rights, powers, and duties of membership. There is, it is true, a personal responsibility as well as a pledge; but the personal responsibility is only for contributions which accrue during ownership, and does not extend to those which accrue before or after.

The contributions of the members consist of premiums, quotas, and additional premiums.

The premium was originally designed to raise a fund for making immediate compensation to owners as losses from fire should occur. The original act of assembly, passed in December, 1794, establishing the society, contemplated that the premium should be paid at the time of insurance; but yet, in case of default, authorized the recovery thereof with interest, and the sale of the property therefor. There have been questions as to the liability of a purchaser from a subscriber, and of the property in his hands, for payment of the premium. *Greenhow, &c. v. Barton*, 1 Munf. 590; *Mut. Ass. Soc. v. Stone, &c.* 3 Leigh, 218. But these need not be further noticed here; there being no claim in the case before us for the original premium, nor any room for such a claim; the regulations of the society, existing at the time of the insurances in question, providing

that a declaration for insurance shall not be binding on either party till payment of the premium. Constitution, Rules, and Regulations of the Mutual Assurance Society, p. 18, art. 11, § 3.

The quotas were intended to supply any deficiency in the fund raised by the premiums, and were authorized by the same act of 1794, by what is there called a repartition; and also in effect, though not in name, by the acts of February, 1809, §§ 6, 7, and March, 1819, § 1. They were substantially additional assessments upon the property insured, and designed to enable the society to keep up a fund the interest of which would be deemed sufficient to pay the annual losses and expenses. A lien for the quotas was given by the original act of 1794, §§ 6, 8, upon the property insured, and the same was rendered liable to be sold therefor, not only in the hands of the subscriber, his representatives, and assigns, but also when sold or mortgaged; and the purchaser or mortgagee was constituted a member in the room of the original owner. The clauses creating this lien, as indeed most of the legislation on the subject of this corporation, are extremely awkward; but there can be no doubt of the intent of the legislature to give a valid and effectual lien, not only against the original member, but against all persons deriving any ownership of the property from him. And this lien was held by this court, in the case of *Mut. Ass. Soc. v. Stone, &c.* 3 Leigh, 218, to attach to and follow the property in the hands of a subsequent *bonâ fide* purchaser without notice of the lien or of the insurance.

The additional premium is for the increase of value or hazard shown by a revaluation, whether the periodical revaluation directed by law and the regulations of the society, or made at any other time, at the instance either of the society or of the insured member. The revaluation does not affect, nor is it requisite for, the validity of the original insurance; except so far as it serves to cure defect therein, or to increase or diminish the sum secured. In other respects the original insurance continues in full force, whether a revaluation be made or not. The member may concur in the revaluation, in which case he executes a declaration of revaluation; but it is not necessary that he should concur, nor that he should have any notice thereof.

In case of the death, absence, or refusal of a member, the special agent proceeds, with the appraisers, in the revaluation; and if that shows an increase of value, the former value still governs, unless otherwise directed by the owner. Act of Assembly of 1805, § 7; Constitution, Rules, and Regulations, pp. 19, 20, 21, 22, § 13, p. 22, § 14. The additional premium is a lien upon the property in like manner as the quotas. *Mut. Ass. Soc. v. Stone*, &c. 3 Leigh, 218.

In the present case the property insured consisted of two tenements in the town of Fredericksburg, which were owned by Claiborne Wigglesworth, and at his death descended to his heirs. One of them was declared for insurance by Wigglesworth, and the other by Wright, a former proprietor, and both were several times revalued after Wigglesworth's death. These tenements were assigned to Wigglesworth's widow for her dower in his real estate: she afterwards intermarried with Waugh, and they sold and conveyed her life estate therein to Shirley, the appellant. The claim of the Mutual Assurance Society is for quotas which accrued after Wigglesworth's death, some before the assignment of dower, others afterwards and before Shirley's purchase, and the rest since his purchase; and also for a small additional premium which has accrued during Shirley's ownership.

It is contended for the appellant that the widow's right is paramount to the lien of the society; and if this be so, then it follows that the property cannot be subjected in his hands to the demand of the society, nor can he be made personally responsible, inasmuch as there can be no indebtedness on his part in the character of owner. This defence is founded upon the supposition of the fact that the insurances of the property were effected subsequently to the intermarriage of Mr. and Mrs. Wigglesworth. The fact is not asserted in Shirley's answer, nor does it appear from any part of the record. I deem it, however, wholly immaterial, as I consider the lien of the society equally valid in either aspect of the case.

It is true that a widow is dowable of all the lands of which her husband was seized at any time during the coverture, and that his alienations and incumbrances are not good against her

unless she has united therein, and relinquished her right, on privy examination, in the manner prescribed by law. But the lien in question is not derived merely from the contract of the husband. It is established by the authority of the legislature, the competency of which cannot be questioned, and the extent of the lien depends upon the true construction of the statute. It is, therefore, a matter of judicial interpretation whether the legislature intended that the lien on the property insured, given in the most comprehensive terms, should be subordinate to the inchoate and contingent dower interest of the wife. To hold the affirmative would be to uproot the whole institution. The effect of the widow's holding her dower discharged of its liability for contributions must inevitably be to abrogate the insurance. During her life estate the assessments upon the property would be utterly nugatory, as they could not be enforced either against the subject or the owner, nor could there be any liability for previous arrears. In this state of things there could be no responsibility of the society for destruction by fire; and the insurance, thus defeated during the tenancy for life, would be destroyed altogether, for the contract was to insure the whole fee simple, and not merely the remainder or reversion. If such had been the understanding of the law, the institution could never have had existence, or must have perished in its infancy by reason of the inherent vice in its constitution, for which there is no remedy, inasmuch as the *feme covert* could not, if she would, relinquish her dower interest. This result would have been inevitable, unless insurances had been confined to spinsters and widows, bachelors and widowers; the insurances of married men would have been practically prohibited. A construction so unreasonable and mischievous is impossible. Nothing could be more pernicious to the interests of the *feme*, or more repugnant to the principles of dower rights. The alienation of the husband by conveyance or mortgage is inoperative at his death as regards the wife, because otherwise the property would be converted, and the proceeds might be wasted. But a pledge by insurance is for the benefit of the *feme*, and tends not to the destruction but to the preservation of her estate, and to authorize it was a wise and benevolent exercise of legislative power.

The widow, therefore, took her dower interest subject to the lien of the society, but she incurred no personal responsibility until the assignment of her dower, whereby she became a member, and then only for the contributions accruing during her ownership. That every owner of a present freehold estate in insured property becomes a member, according to the true spirit of the law, and the scheme of the institution, I cannot doubt, whatever difficulty might be presented by the mere letter of the statute. As to those contributions which accrued during Wigglesworth's life, and for which, if still in arrear, the assets of his estate would be liable since his death, they seem to have been paid, and to form no part of the present demand; for those which accrued afterwards and before the assignment of dower, his heirs are personally responsible, for till then they succeeded to the membership of their ancestor, and it was their duty to assign the widow her dower. The widow and her second husband are personally liable for the contributions which accrued after the assignment of dower and before their sale to the appellant; and for those which have accrued since, the appellant is personally responsible, but for those only. If a regulation of the society (Constitution, Rules, and Regulations, pp. 16, 17, § 4) is to be understood as intended to make a purchaser or mortgagee personally liable for arrears prior to his title, it transcends the powers of the corporation, which has no authority except over its own members; and it is not until they acquire their title that such persons become members, and then only as regards their own rights and responsibilities.

The decree of the circuit court is consequently erroneous in subjecting the appellant personally to the whole arrears of contributions, with the interest and damages thereon. A personal decree against him for so much of the demand as has accrued during his ownership would not have been improper, but would have given only partial relief to the society. The plaintiffs are entitled to a lien upon the property for the whole principal and interest of their claim, but not for the damages. The damages, it is true, are not to be regarded as a penalty, being nothing more than a reasonable allowance, under the regulations of the society, for the expenses and trouble of collection. It is therefore quite proper that these liquidated damages should be em-

braced in a personal judgment or decree; but no lien therefor is given by the statute, and the effect of treating them as an incidental lien would often be to make one person liable for them in consequence not of his own default, but of the default of another.

When we next consider what decree ought to have been rendered, it appears to me that the lien of the society is to be treated as an entire thing, and not, as suggested by the appellant's counsel, to be broken into parts, and carried out separately against the estate for life and that in reversion. Such a mode of enforcing an incumbrance would, I think, be unprecedented, and inevitably tend to the sacrifice of the property, and the diminution of the security. There can be no objection, I admit, to ascertaining the several personal responsibilities; and that ought to be done at the most convenient stage of the cause, with the view of adjusting the equities amongst the defendants arising out of the proper relief to the plaintiffs, and, it may be, to the more perfect relief of the plaintiffs themselves. But in the adjustment of those equities the appellant will not be entitled, as his counsel supposes, to an apportionment of the quotas between the estate for life and that in reversion.

No part of the quotas which have accrued since the assignment of dower is, in my opinion, chargeable upon the reversion in case of the life estate. The argument for the appellant is, that the quotas are for the insurance of the whole fee simple, and inasmuch as that operates, in the event of loss, to the remuneration of the reversioner as well as of the tenant for life, it is but reasonable that the former should bear a due proportion of the burden enuring to their benefit. There is much plausibility in this reasoning, but it keeps out of view the important consideration that the quotas, though a lien upon the capital, are a charge upon the profits. They detract by their amount from the income of the estate, but do not break in upon the principal; and the tenant for life, while enjoying the profits, ought to keep down such annual or occasional charges, as the reversioners will have to do when, upon the falling in of the life estate, they come to the perception of the profits. The tenant for life is directly responsible to the society for the

quotas, and subject to an action at law for the recovery thereof, but it is otherwise as regards reversioners, who cannot be called upon at all personally during the continuance of the life estate. And what reason can be given for this, other than the fact that the tenant for life is in the perception of the profits, and consequently alone responsible for the charges upon them? and what better right can there be to call upon the reversioner for contribution in regard to quotas, than in regard to taxes, or a ground rent, or a rent charge? The tenant for life, moreover, not only enjoys the profits, but also any income accruing from the insurance itself, for the dividend of any surplus interest arising from the capital funds of the society, directed by the act of 1803, § 12, would surely be payable to the tenant for life, and not to the reversioner or remainder-man.

We must bear in mind that the assessment of quotas arises out of an insurance effected by the owner of the whole fee, to the enjoyment of whose estate in the property the tenant for life and the reversioners succeed successively. It is upon these facts alone that the claim to apportionment is founded, under the influence of the maxim of equity that he who shares the benefit must share the burden. But here the reversioner shares no benefit, so far as the profits are concerned, during the continuance of the life estate, though the property should be destroyed by fire; for in that event the effect of the insurance is to convert the estate from land into money, and to give the interest in lieu of profits to the tenant for life, and the principal, upon the falling in of the life estate, to the reversioner. And if there is a common benefit to the tenant for life, and the reversioner in securing the capital which yields the profits, it ought to be paid for out of those profits progressively, and in the same succession, with the original hazard. Nor is the claim of tenant for life against reversioner, for contribution on account of quotas during the life estate, stronger than would be that of reversioner against the estate of tenant for life, for quotas accruing during the reversion; for the insurance was of the whole estate, and the quotas are the consideration for the entire insurance.

The supposed analogy of fines for the renewal of leases throws no light upon the present question; for the renewal is in the nature of a new purchase, of which the fine is the con-

sideration, and, in cases to which the doctrine is applicable, the tenants are treated as joint purchasers of successive interests; and that of course calls for an apportionment of the price according to the value of their respective interests, as much so as if the transaction were an original purchase. A joint declaration for insurance made by successive tenants, would bear some resemblance to such renewal of leases; but here the insurance is a mere incumbrance, descending with the estate from the owner of the fee by whom it was created. The most obvious and striking analogy is that of a mortgage; and there the tenant for life is obliged to keep down the interest of the debt, and in case of redemption to contribute beyond the interest for whatever benefit he derives from the liquidation of the debt. 1 Story's Eq. 465. Of course the reversioner or remainder-man pays the interest, to prevent a foreclosure, the tenant for life is bound to refund; and so it would be in regard to payment of insurance quotas made to prevent a sale under the lien. The certain benefit to the reversioner in the case of a mortgage, or his contingent benefit in the case of an insurance, arising from the payment of the interest in the former or of the quotas in the latter, does not relieve in any degree the tenant for life from the duty, imposed by his enjoyment of the profits, of keeping down the annual or occasional charges. And what, at most, is the substantial effect of the insurance, but a reparation of the property, made or paid for, if you please, by the tenant for life? and who ever heard of the cost of reparations by the tenant for life, whether partial or total, voluntary or compulsory, being thrown in any degree upon the remainder-man or reversioner, however beneficial to him?

A claim like the present on the part of a dowress, or other person acquiring her title, has less color of reason than that of any other tenant for life; for the assignment to her of one third of the real estate for dower is based upon an estimate of the annual profits, which involves an allowance for charges thereupon; and so another contribution from the heirs on account of those charges would yield her a double compensation.

Upon the whole, my opinion is that the decree of the circuit court ought to be reversed, and the cause remanded for further proceedings, according to the principles above indicated, and

such further directions as shall be given by the decree of this court.

STANARD, J. I have grave doubts on several of the points embraced by the opinion just delivered by my brother Baldwin. But as the residue of my brethren have no hesitation in concurring in that opinion and the proposed decree of the court, so that whatever the result of any farther investigation on my part might be, the result of the decision would remain unaffected, I have not thought proper to ask that the decision should be delayed for the purpose of enabling me to make up an opinion.

BROOKE and ALLEN, JJ., concurred in the opinion of BALDWIN, J.

The decree of the court of appeals was entered in the following terms: —

The court is of opinion that the decree of the circuit court is erroneous in charging the appellant personally with the whole amount of the appellees' demand; the appellant being liable personally only for the quotas and additional premiums which accrued during his ownership of the property, with the interest and damages thereon: that the heirs of Claiborne Wigglesworth, deceased, are personally liable for the quotas which accrued after his death and before the assignment of dower to his widow, with the interest and damages thereon: and that the widow and her second husband Waugh are personally liable for the quotas which accrued after the assignment of dower and before their sale to the appellant, with the interest and damages thereon. The court is further of opinion that the appellees have a lien upon the tenements in the proceedings mentioned respectively, for the principal money and interest respectively due for the insurance thereof, but not for the damages; which lien is to be enforced, if necessary, against said tenements respectively, by sales of the whole fee simple title thereof, and of the whole of each tenement, unless from the nature of the property it be practicable and expedient to lay off portions thereof for such sales respectively. The court is further of opinion that such sales, under the circumstances of the case, ought to be upon credit, except for the charges of the sale, which ought to be required in cash: that the amount due to the appellees of principal

money and interest, at the times of the sales respectively, ought to constitute the first deferred instalment (which ought to bear interest), and the residue of the purchase money the remaining instalments; the credit for the deferred instalments to be liberal, and the purchase money well secured. The court is further of opinion, that before directing such sales, the respective personal liabilities of the defendants for principal money, interest, and damages, ought to be ascertained; and that if the appellant, or any other person, should advance the amount chargeable to the heirs of Wigglesworth, and the personal responsibility of the appellant, and the life estate in the property, should be sufficient to insure payment of the residue due the appellees, then there should be no sale of the reversion, but a lien thereon established for reimbursement of the amount so advanced with interest thereon; but such lien ought not to be enforced until the falling in of the life estate. The court is further of opinion, that in the event of such sales, the deferred instalments, except the first, ought to be divided between the appellant and the heirs of Wigglesworth, according to the value of their respective interests in the property; and that the respective shares ought to be subjected to the respective equities of the defendants amongst themselves. And the court is further of opinion, that if such sales should be necessary, and it shall appear that the common interest of the appellant and the heirs of Wigglesworth will be promoted by the sale of only one of said tenements, and the application of the proceeds as aforesaid, in exoneration of the other, that course of proceeding ought to be adopted, if the relief of the appellees will not be impaired, nor the rights of others injuriously affected thereby. It is therefore ordered and decreed that the said decree of the circuit court be reversed with costs, and the cause remanded for further proceedings according to the principles above declared.

Action. — Parties.

BAYLEY & MINARD vs. ONONDAGA COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1844.)

Action. — Parties.

A bond made by an insurance agent, binding himself in a certain sum, for the faithful performance of duties, "to the said *directors*, their successors, or assigns," is in legal effect made to the company, so that they may sue thereon in the corporate name.

It is not necessary in such case that the declaration, in an action on the bond by the company in their corporate name, should aver that the bond was made to them by the name and description of the directors, &c.

ACTION upon a bond given by Bayley and Minard for their faithful conduct as insurance agents for the plaintiffs, in which the declaration alleged as follows: That the said defendants had, by their certain writing obligatory, acknowledged themselves to be firmly bound "unto the directors of the said Onondaga County Mutual Insurance Company, in the sum of \$1,000, to be paid to the said directors, or their successors, or assigns." Breach, non-performance of duty, and judgment below for the plaintiffs. The defendants now brought error, alleging that the suit should have been brought in the name of the directors.

B. D. Noxon, for the plaintiffs in error.

J. R. Lawrence, for the defendants in error.

By the Court, NELSON, C. J. The ground of error relied on is, that no right or title is shown in the plaintiffs below; the obligation being to the directors of the company. If the declaration had been drawn in a lawyer like manner, it would have contained an averment that the bond was made to the plaintiffs by the name and description of the "directors of the Onondaga County Mutual Insurance Company." But I am satisfied the declaration is sufficient, after verdict or judgment by default, without this averment. The board of directors, being the known legal agents of the corporation, are to be regarded as its representatives in all their official acts and doings. Sess. Laws of 1836, p. 177; *Id.* p. 43, § 3. They are to be so regarded upon this record: and then the rule applies, that where a contract purports on its face to have been made by or with an agent,

¹ 6 Hill, 476.

Action. — Parties.

having no direct or beneficial interest in the transaction, the suit must be brought in the name of the principal, as the contract is in legal effect made with him, and not with the agent. 1 Chitty's Pl. 7, Am. ed. of 1840. The case of *Pigott v. Thompson*, 3 Bos. & Pull. 147, exemplifies the rule. There, certain persons named were appointed commissioners for draining lands, with power to erect toll-gates and take tolls, and the tolls were vested in the commissioners and their successors. They let the tolls to the defendant for three years, who signed a writing acknowledging the hiring at £145 per annum, "to be paid to the treasurer of the commissioners," &c.; and the question was, whether the rent could be recovered in the name of the treasurer. The court held that the contract was in legal effect with the commissioners, and that the action should have been brought in their name. In *Gilmore v. Pope*, 5 Mass. Rep. 491, the plaintiffs sought to recover certain assessments made upon shares in a turnpike company, subscribed for by the defendant; and the promise in the subscription paper was, to pay the assessment to John Gilmore, the agent of the company, in whose name the action was brought. The court nonsuited the plaintiff, holding that the agent could not sue, and that the action should have been brought in the name of the corporation. Afterwards, an action was brought on the same subscription paper, in the name of the company, and it was sustained. *Taunton & South Boston Turnp. Co. v. Whiting*, 10 Mass. R. 327; and see Lawes on Pleading, 110, 312.

As a general rule, a written contract should be set out in pleading according to its legal effect; but where the true meaning is doubtful, it is most advisable to set out the contract in *hæc verba*, and leave the court to construe it. 1 Chitty's Pl. 306, 307; 1 Barn. & Cress. 358; 3 Barn. & Ald. 66, 69, 70. In this case, the legal operation and effect of the bond is sufficiently obvious, though I admit the count would have been more scientific if the averment already mentioned had been made. But the court cannot fail to see, upon the face of the record, that the obligation is to the plaintiffs, by the name of their directors, the legally constituted agents of the corporation.

I am satisfied that the plaintiffs show a sufficient title to sustain the suit upon the bond, and that there is no foundation for the writ of error.

Judgment affirmed.

Practice. — Change of Venue.

PATRICK McLOUGHLIN vs. THE CORPORATION OF THE ROYAL
EXCHANGE ASSURANCE COMPANY.¹

(Exchequer, Ireland, Trinity Term, 1844.)

Practice. — Change of Venue.

In a motion by an assurance company to change the venue after issue joined, to the county in which the fire took place, on an allegation that a view is necessary for the defence, this court will not grant the motion, unless the reason why such a view is necessary appear on the face of the affidavit. The mere statement in the affidavit that a view is necessary is insufficient.

Motion by defendant to change the venue after issue joined to a county, because the witnesses for the defence reside there, is sufficiently met by the plaintiff on an allegation that the majority of his witnesses reside in the county in which he has brought the action.

Seem, on behalf of a defendant the court will be slow to change the venue to a county in which the father of the attorney for the defendant is the sub-sheriff.

THIS was a motion to change the venue, after issue joined, from the county of the city of Dublin to the county of Sligo, to support which the affidavit of Thomas Mostyn, the attorney and agent to the defendants at Sligo, stated that the plaintiff had effected a policy of assurance with him for the sum of £2,300, viz., £1,300 on stock in trade, £800 on two dwelling-houses, and £200 on furniture; that on the 7th of March last, a fire took place in plaintiff's shop, which was immediately extinguished; that on the 9th plaintiff attended at the office and made a claim for £1,318, for loss occasioned to his stock in trade, and also furnished an estimate for the injury to his shop, amounting to £16 15s. 0d.; that on the 14th of said month plaintiff claimed for the loss on his goods the reduced sum of £775; that plaintiff having issued a writ against the defendants, deponent appeared thereto, and the declaration was filed, laying the venue in the county of the city of Dublin; that defendants pleaded several pleas, amongst others, that the loss was caused by the fraudulent contrivance of the plaintiff, his agents and servants, which plea the plaintiff had traversed; that in order to defend themselves, the defendants would require that the jury should have an opportunity of viewing the shop, and seeing the extent of injury done, and for that purpose to have a

¹ 9 Irish Law, 510.

distringas with a clause of view; that it would be necessary to examine a number of witnesses who were present on the night of the fire, who could give material evidence on behalf of the defendants, all residing in the town of Sligo.

Brewster, in support of the motion. The plaintiff opposes this application by his affidavits on three grounds: First, that the goods in question stated to have been destroyed by the fire were bought from a number of merchants in Dublin, whom he must examine on the trial, and that he is not able to pay their expenses to Sligo. • That objection can be waived by admitting, as the defendants now offer to do, an affidavit from those merchants that the goods were sold and delivered in Dublin, but not that they were delivered in Sligo; second, that it is the plaintiff's object to have a speedy trial, as by delay he must become a bankrupt. But supposing a verdict in his favor, he could not have a judgment against the defendants earlier on a trial in town than at the ensuing assizes; third, that the father of Mr. Mostyn, the agent, is the sub-sheriff of the county of Sligo; but there is nothing in that objection, because if the issue be tried before a special jury, the special jury list is made wholly without the control of the sheriff; and if by a common jury, the plaintiff can put the matter into the hands of the coroner.

Fitzgibbon & J. D. Fitzgerald, contra. The pleas put in by this assurance company are discreditable; and though some are demurrable, yet to save time issue has been joined on all; first, that the stock was not consumed or injured; second plea, that plaintiff did not prove the loss; third, that fraud appeared on the part of the plaintiff; fourth, that a fraud appeared in representing a greater quantity of goods consumed than was the fact; another plea, that plaintiff did not procure a certificate from the church-wardens; another, that the deed is not their deed; another, that the supposed loss was occasioned by the neglect of the plaintiff and his servants. That is a fair issue, and can be tried here. The defendants shall have a model of the premises at the plaintiff's cost, and at liberty to examine the premises. Mostyn does not swear that he viewed the premises, and from that view believed that if the jury saw them it would be favorable to his clients. There is nothing of fraud charged against the plaintiff. [RICHARDS, B. Does Mos-

tyn state anything in his affidavit to show the fire was malicious?] No, he does not, he only states that he has filed a plea involving that issue. [PENNEFATHER, B. In what words does Mostyn state that a view is necessary?] In these words: "Saith that in order to enable the defendants to bring their defence fairly and fully before a jury, it will be necessary that the said jury or some of them should have an opportunity of viewing the shop in which the said fire took place, and its situation, and to see the extent of injury done thereto and the space within which the fire was confined." This is not a case for a view. *Hawthorn v. Denham*.¹ As to the balance of witnesses, *Watson v. Kennelly*² is in our favor. If they intend to meet the case on the merits, let the other pleas be abandoned, and let the defendants undertake to go to trial on the issue of default on the part of the plaintiff or his servants, and then the plaintiff will consent to change the venue to Sligo. [PENNEFATHER, B. That is a fair offer, will the defendants accept it?]

Baker, in reply. The defendants will not accept that offer: as to the affidavit made on behalf of the defendants, it is sufficient. The precedents in the cases are similar to the present. *M'Donnell v. Carr*.³ The defendant should not be required to spread out and disclose on the face of his affidavit the grounds of his defence. [LEFROY, B. No; but might not the defendant say he has inspected the premises, and is led to believe that there was fraud in the transaction?] The leading case on this subject is *Hodinott v. Cox*.⁴ [LEFROY, B. What was the affidavit there? Were the circumstances laid before the court to show to them the grounds of the necessity for a view?] No; they are not stated in the report. The influence of a particular person is not sufficient to change the venue. *Hall v. M'Kernan*.⁵

CHIEF BARON. We are of opinion that sufficient ground has not been laid before the court to induce it to grant this motion. The plaintiff has laid his venue, as he was at liberty to do, in a particular county, and the defendant cannot now on the ordinary affidavit change that venue; he therefore seeks to do so by affidavit on special grounds; first, because a number of witnesses to be produced on the part of the defendant, amounting, as is stated, to fifteen, reside in Sligo. In answer

¹ 3 Irish Law, 1. ² *Ib.* 214. ³ *Hayes*, 376. ⁴ 8 East, 268. ⁵ 2 Irish Law, 359.

to that, the plaintiff avers that the majority of witnesses to be produced on his part reside in Dublin. If the contending parties make affidavits such as those now before the court with regard to the balance of witnesses, we do not know how far it might be safe to rely on them. However, on the balance of convenience, we think that balance is as much in favor of the plaintiff as of the defendants, and on that point the plaintiff has fully met the special ground put forward by the defendants. The next ground is, that a view is necessary for a proper defence by the defendants; but on authority we find that it is not sufficient to allege that a view is necessary. The reason why it is supposed to be necessary should appear on the face of the affidavit. Does the reason why a view would be necessary appear on the face of this affidavit? Can it be collected from it that it is necessary? It cannot. Again the plaintiff has offered, if the defendants will undertake to abandon all other pleas and go to trial on that plea alone, on which it might become advisable to have a view, that in that case he will consent to change the venue to Sligo; the defendants have refused that offer, and coupling that refusal with the affidavit of Mostyn, we conceive that the view required is not necessary. But it has been said at the bar that Mostyn's affidavit is in conformity with the precedents, and with the form of the affidavits in the cases relied on on behalf of the defendants, and therefore sufficient; but that is clearly a mistake; for in the note to *M'Donnell v. Carr*,¹ it is stated in the affidavit filed by the agent of the company, and used on the motion, "that he believed and hoped he would be able to prove that the fire was designed and intended by the plaintiff, and that such burning was fraudulent and malicious, and planned by the plaintiff." On these grounds we decide this motion, and therefore do not feel it necessary to rely on the other ground put forward to us by the plaintiff, viz., that the attorney for the defendants, their agent also, is the son of the sub-sheriff of the county of Sligo, to which the defendants seek to change that venue; yet we cannot exclude that fact from our consideration. Knowing that the law regards such a circumstance with peculiar jealousy, we should be slow to send the plaintiff against his own will to trial there. On the whole, therefore, we think this motion must be refused with costs.

¹ Hayes, 376.

ST. LOUIS INSURANCE COMPANY vs. GLASGOW, SHAW & LARKIN.¹

(Supreme Court, Missouri, July Term, 1844.)

Negligence. — Breach of Stipulation. — Pleading.

Insurers are responsible for a loss occasioned by a risk insured against, notwithstanding such loss may be attributable to the negligence or misconduct — not amounting to barratry — of the assured or his agents.

Where a steamboat was insured, among other risks, against fire, and afterwards was put on the floating dock, for the purpose of being repaired, and while in the dock was burned, and such burning was occasioned by the carelessness and negligence of the workmen having the boat in charge, the insurers were held liable for the loss.

Where the assured stipulates in the policy that the boat shall be completely provided with "master, officers, and crew," it is no breach of such stipulation that the boat was placed, temporarily, in the charge of workmen, for the purpose of repairs.

Where the assured agrees that the boat shall be completely provided with "master, officers, and crew," it is necessary to aver, in an action on the policy, that the boat was so provided.

Spalding & Tiffany, for appellants.

H. R. Gamble, for appellees.

NAPTON, J., delivered the opinion of the court.

This was an action of covenant on a policy of insurance, brought by Glasgow, Shaw & Larkin against the insurance company. The policy was for \$6,000 on one fourth of the steamboat "Pizarro," for one year, against the ordinary perils of "rivers, fires, enemies," &c., and the assured agreed, "that the steamboat aforesaid should be completely provided with master, officers, and crew." The declaration contains no averment of a compliance with the agreement, that the boat should be completely provided with "master, officers, and crew," but avers the loss to have happened within the year, and by fire, whilst the boat was lying at St. Louis.

The defendants filed several pleas, five of which were demurred to, and the demurrer sustained. The pleas are numbered on the record, the 5th, 6th, 7th, 8th, and an additional plea.

The fifth plea alleges, that the loss in the declaration mentioned was occasioned by and through the mere carelessness, negligence, and misconduct of the plaintiffs, their servants, and

¹ 8 Mo. 713.

agents, then and there in the possession, charge, and control of said boat.

The sixth plea avers, "that just before the loss in the declaration mentioned, the plaintiffs, their servants, and agents caused the said steamboat to be put on a dock, called a floating dock, by means of which dock the boat was raised out of and above the surface of the river, and so continued until the loss; and while the boat was in that situation, the plaintiffs, their servants, and agents caused a fire to be made and kept in a stove on the deck of the boat, and caused large quantities of picked oakum to be placed and spread upon the deck of the boat, about and near the fire so made and kept by the plaintiffs, their servants, and agents, whereby and by means whereof the peril and danger of consuming, burning, and destroying said boat by fire was enhanced and increased, without the knowledge, privity, or consent of the defendants, contrary to the tenor and effect, true intent and meaning of the policy."

In the seventh plea, it is alleged, that "before and at the time of the loss, the steamboat was on the floating dock, above the surface of the Mississippi; and just before the loss, certain workmen and laborers in the retainer of the plaintiffs caused a fire to be made in a stove on board the boat, and then and there, near and about the fire, picked a large quantity of combustible material called oakum, and spread the said oakum about and near the fire, whereby the peril and danger of burning said boat was greatly increased, and, by the mere carelessness, negligence, and misconduct of said workmen and laborers, the said oakum was set on fire, and by the fire so occasioned, the said boat was burned," &c.

The eighth plea states, that just before and at the time of the loss, the said steamboat was not in the possession, nor under the care or control of the plaintiffs or other owners, the master, officers, and crew, or the servants and agents of the owners, or any of them, but the said boat, at the time when, &c., was in the possession of certain workmen and laborers, with the knowledge, privity, and consent of the plaintiffs, and without the knowledge, privity, and consent of the defendants, contrary to the intent of the policy, and while said boat was so in possession, and under the care and control of said workmen and

laborers, the said boat was burnt, consumed, and destroyed, by the mere carelessness, negligence, and misconduct of the said workmen and agents, which is the same loss," &c.

The additional plea alleges, "that just before the loss, the plaintiffs and their servants and agents, without the knowledge or consent of the defendants, caused the boat to be put and placed on the floating dock, and raised above the water, and so kept until at and after the loss; and while the boat was so lying on the dock above the Mississippi River, and just before the loss, the workmen engaged in the retainer of the plaintiffs, in repairing the boat, did, unnecessarily and improperly, without the knowledge or consent of the defendants, cause a fire to be made and kept on board said boat, in a stove there, and did then and there, unnecessarily and improperly put, place, and spread, near and about said boat, a large quantity of a certain combustible material called picked oakum, whereby the danger and peril of fire, and the burning of said boat, became and was improperly and unnecessarily greatly increased and enhanced; contrary to the duty of the plaintiffs, their servants, and agents, in that behalf, and the meaning of the policy; and afterwards, while the said boat was on the said dock, above the surface of said river, and while the said picked oakum was so kept and spread on and about the said boat, was then and there set on fire, and burned, and by the burning of said oakum, and the fire so occasioned, the said steamboat was burned," &c.

The only question presented by the record is, the propriety of the action of the circuit court in sustaining the demurrer to the above pleas.

Upon this question several points have been made, but the most important one arises out of the fifth, sixth, and eighth pleas, in which the loss is averred to have been occasioned by the negligence, carelessness, and misconduct of the agents of the assured. As the point is also involved in the consideration of the other pleas, it will first be disposed of.

It has been admitted in the argument of this case, and the adjudged cases fully sustain the admission, that where the misconduct amounts to barratry, and there is no express insurance against barratry, the underwriters will not be responsible for a loss occasioned by barratrous conduct of the agents of the insured.

It is also agreed, that where the insured have not complied with their express warranty that the vessel shall be competently provided with master, officers, and crew, a loss occasioned by such non-compliance is not covered by the policy. Some of the pleas demurred to are referred to this principle, and their sufficiency will be considered hereafter.

The question is, whether, when the insured have provided competent officers and crew, and the boat has been furnished with the necessary tackle and appurtenances, in compliance with the express warranty in the policy, the underwriters are discharged from a loss occasioned by a peril insured against, by showing that such peril was brought about by the negligence or mismanagement of the agents of the insured. Upon this question the counsel for the appellants has presented, in his brief, a critical review of all the authorities, reaching back to some of the earliest English cases. We shall not attempt to reconcile the cases thus arrayed, nor to defend the opinions and course of reasoning which have given occasion to the comments, and in some instances to the censure of the learned counsel.

An examination of the cases will, we think, show that since the case of *Burk v. Royal Exchange Company*, decided in 1818, nearly every court in which this question has arisen has manifested a decided inclination to hold the underwriters responsible for losses occasioned by a risk insured against, notwithstanding such loss may have been attributable to the negligence or misconduct of the assured or his agents. *Walker v. Mail-land*, 5 Barn. & Ald. 171 ; *Bishop v. Pentland*, 7 Barn. & Cress. 219 ; *Patapsco Insurance Company v. Coulter*, 3 Peters' Rep. 222 ; *Columbia Insurance Company v. Lawrence*, 10 Peters, 507 ; *Waters v. Merchants' Insurance Company*, 11 Ibid. 213 ; *Perrin's Administrators v. The Protection Insurance Company*, 11 Ohio Rep. 147.

The doctrine established by these cases, we consider founded on principles of sound policy. It does not depend upon the insertion of barratry, as one of the risks assumed, but it arises from the fact, that the loss happens by a risk aimed against, and that to permit the insurer, in such cases, to show that it can be traced, either immediately or remotely to some negligence, care-

lessness, inattention, or misconduct of the owner or his agents, would be to raise an implied warranty, not of the general competency of master, officers, and crew, but of their diligence at all times, and under all circumstances. To adopt this construction of the policy would certainly tend to great embarrassment in the recovery of claims clearly understood to be secured by the contract of the parties. It would be imposing upon the assured a liability, which is certainly not to be found in the words of his contract, and not, as we think, justified by its spirit. He is bound to provide competent officers, and to have his vessel seaworthy, but he does not stipulate that these officers shall be exempt from the frailties incident to men in all situations; that they shall exercise such diligence as shall prevent all losses from mistakes, carelessness, and negligence. If the negligence be what is called *crassa negligentia*, which is by some writers considered synonymous with fraud, the case is different, and the underwriters are exempt upon another principle, unless fraud also is expressly insured against. Indeed, there are few of the risks contained in the common marine and river policies, which might not be traced to some act of negligence or oversight in those having charge of the vessel. In the case of fire especially, we cannot readily conceive of any loss by this element, unless in cases of lightning, where it must not necessarily have been the result of some mismanagement on the part of those in command or their servants. To say, in such cases, that though the vessel has been insured against fire, yet the underwriter has not insured against a fire happening by negligence, would be to "keep the word of promise to the ear and break it to the hope." It is true that this doctrine, that negligence or misconduct on the part of the servants or agents of the insured will not exempt the underwriters, where the loss is occasioned by a peril insured against, was originally held in cases where barratry was one of the perils enumerated in the policy, and this circumstance afforded the courts a plausible ground for the adoption of the rule. This was the ground taken by Judge Johnson in the case of *The Patapsco Insurance Company v. Couller*, 3 Peters, decided in 1830, though Judge Story subsequently intimates, in the case of *Waters v. Merchants' Insurance Company*, that a majority of the court were for the plaintiff, upon

the general ground, that the proximate and not the remote cause was to be looked to. Upon the insufficiency of this course of reasoning, the supreme court of Ohio chiefly relied on the fire cases referred to in the brief of the appellants' counsel for adhering to the doctrine supposed to have been settled by more ancient cases, and disavowing and repudiating what was thought to be a mere innovation by the court in *Bank v. Royal Exchange Company*. In all the English cases, we suppose barratry was among the enumerated perils in the policy, but in the case of *Walker v. Maitland*, 5 Barn. & Ald. 171, though this circumstance is alluded to by the judges, their opinion seems to be founded mainly upon the ground that the immediate cause of the loss was a peril insured against, and the underwriters should not be permitted to show negligence as a cause of such peril, because there was no implied warranty in the policy that there would be no negligence. Bayley, J., says: "It is the duty of the owner to have the ship properly equipped, and for that purpose it is necessary that he should provide a competent master and crew in the first instance; but having done that, he has discharged his duty, and is not responsible for their negligence as between him and the underwriters." Holroyd, J., says: "This case cannot be put on the ground of the breach of the implied warranty to provide a master and crew of competent skill. It is sufficient if the owners provide a master and crew generally competent; there is no implied warranty that such a crew shall not be guilty of negligence."

So, in the case of *Bishop v. Pentland*, 7 Barn. & Cress. 219, the court seem to lose sight of the barratry clause, as affording any reason for their conclusions; and Bayley, J., says: "The cases of *Burk v. The Royal Exchange Company*, and *Walker v. Maitland*, establish as a principle, that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks though the remote cause may be traced to the negligence of the master and mariners." And Holroyd, J., says: "It is clearly established, that if there be an actual stranding, although it arise from the negligence of the master and mariners, the underwriters are liable."

The Columbia Insurance Company v. Lawrence, 10 Peters, 508, was a case of insurance against fire on land, but the opin-

ion delivered by Judge Story shows the gradual progress of this doctrine in that court. "In regard to marine policies," says Judge Story, "this was formerly a question much vexed in the English and American courts; but in England, the point was completely settled, in *Burk v. Royal Exchange Company*, upon the ground, that *causa proxima non remota spectatur*; and therefore, a loss whose proximate cause is one of the enumerated risks in the policy, is chargeable to the underwriters, although the remote cause may be traced to the negligence of the master and mariners. Although, in that case, the risk of barratry was also assumed by the underwriters, yet it is manifest that the opinion proceeded upon the broad and general ground. The same doctrine was afterwards affirmed in *Walker v. Mailland*, and *Bishop v. Pentland*, and is now deemed incontrovertibly established. The same doctrine was fully adopted in this court, in the case of *The Patapsco Insurance Company v. Coulter*."

These remarks of Judge Story are certainly *obiter dicta*, and may be obnoxious to the severe criticism bestowed on them by the appellants' counsel, but they show that the unsatisfactory reasons given by the British judges for a doctrine advanced, as is now said, for the first time in 1818, were no obstacle to its rapid adoption by other courts, and that this court was even then prepared to sanction it to the same extent it was ultimately settled in *Waters v. Louisville Marine Insurance Company*.

In Ohio, the cases of *Lodwicks & Kennedy v. Ohio Insurance Company*, 5 Ohio Rep. 433; *Gazzam v. Ohio Insurance Company*, Wright's Rep. 202; *Jolly's Executors v. Ohio Insurance Company*, Ib. 539; *Fulton & Foster v. Lancaster Insurance Company*, 7 Ohio Rep. 1,¹ were decided since the case of *Burk v. Royal Exchange Company* in England, and they are the only cases to which we have been referred, in which the doctrine held in this last and the succeeding English cases has been expressly denied, that were decided since the year 1818. These cases have all been overruled by the same court, in *Perrin's Administrators v. The Protection Insurance Company*, 11 Ohio Rep. 147. Whatever may be thought of the propriety of that court's yielding to the authority of the supreme court of the

¹ Page 288. (2d ed.).

United States, in a question upon which the opinion of that court was not binding upon them, it is at least to be inferred, that the policy and good sense of the doctrine must have been most striking, to have induced a court thus to overrule what had been solemnly and repeatedly adjudged in several previous cases.

In opposition to this doctrine, thus authoritatively settled in England, in Ohio, and in the supreme court of the United States, the counsel for the appellants have cited numerous adjudications on both sides of the Atlantic. *Gordon v. Remington*, 1 Camp. 123; *Hodgson v. Malcom*, 5 Bos. & Pull. 336; *Phyn v. Royal Exchange Company*, 7 T. Rep. 505; *Vos & Graves v. U. Insurance Company*, 2 Johns. Ca. 180; *Brazier v. Clapp*, 5 Mass. Rep. 5; *Cleveland v. Union Insurance Company*, 8 Mass. Rep. 308; *Grim v. Phœnix Insurance Company*, 13 Johns. Rep. 451. In relation to these cases, it may be observed, that they were all decided previous to 1818. Moreover, many of these cases, though apparently conflicting with the views which now prevail in relation to the duties of the insured, in a marine or river policy, will be found to turn upon that clause of the policy which stipulates for the competency of the master and crew of the vessel. The mere fact of negligence or misconduct is not the leading and prominent feature in the cases; but it is connected with the breach of the express or implied warranty, that the insured will employ competent agents. For instance, the case of *Brazier v. Clapp* was a case in which the captain of the vessel had pursued a route from Boston to New Orleans which was unusual, and Judge Sedgwick, who delivered the opinion of the court, said: "A general position, that the mistake of the captain, under no circumstances, forms an excuse for a deviation, is certainly not true. The most skilful, discreet, and prudent master may, and probably, in almost all long voyages, does commit mistakes, by which his ship may be taken out of the most direct and shortest course. Such is not a deviation that will discharge the underwriters." But he adds, "If the captain had ordinary skill, and was informed as he ought to have been, as to the voyage he was pursuing, no fact which was exhibited at the trial, or is now pretended to have existed, amounts to anything like a justification or excuse for the deviation on which the defendant relies as having vacated the contract. If such

skill and information were possessed by the captain, the deviation would seem to be merely wanton, or done for the convenience of the captain, in landing his wife on the Vineyard. On the other hand, if the deviation happened either from the want of skill or the gross ignorance of the captain, that would doubtless defeat the claim of the plaintiffs to recover; for, among other things which the law, from the nature of the contract of assurance, imposes as obligation upon the assured, is the duty to provide a master of competent skill, prudence, and discretion to navigate the vessel, and if any loss takes place, which may be justly supposed to have happened from a master of that character not having been provided, the underwriters are not responsible for it."

Now, there is nothing in this opinion conflicting with the position which we maintain. The insured is bound, by the express stipulations of the contract, to provide a master, and one of competent skill, prudence, and discretion; but it does not therefore follow, that he also warrants that the master thus ordinarily competent shall not be guilty of negligence or mistakes. In the case cited, it was a mere question of evidence, and the Massachusetts court only hold that the departure from the usual route, proved in that case, was evidence of such unskillfulness, or gross ignorance, in the captain as showed him not to have been a competent master, within the meaning of the policy, and was therefore such a breach of the warranty as to discharge the underwriters.

So, in *Cleveland v. Union Insurance Company*, 8 Mass. Rep. 308, the ship's register was left behind, and a loss by capture ensued; and though it is not pretended that the decision in this case can be reconciled with the doctrine since established, yet the remark of Judge Sedgwick will show that the breach of the supposed warranty of the competence and skill of the master is principally relied on to discharge the underwriters. "The principle of an implied warranty," says Judge Sedgwick, "on the part of the assured, that everything shall be done to prevent a loss, pervades the whole subject of marine insurance; or, in other words, that the insurer shall be responsible for no loss but such as is occasioned by some of the perils which, according to a fair construction of the contract, was, in the understanding of

the parties, insured against. Hence is the principle, that the insurer shall answer for no loss resulting from the gross negligence or ignorance of the master, or from the want of a competent crew : hence, also, the insurer is not liable for any loss or damage which may happen to goods from any fault or defect of the ship, not arising from the violence of the wind or sea, or from an accident or misfortune in the voyage, but from a latent defect before she sailed ; hence, too, there is an implied warranty that the ship shall proceed in the usual and common route, and therefore, a deviation from it discharges the underwriters."

Here the learned judge lays down principles to which, in the main, no exception can be taken. The general principle, that it is the duty of the assured to do everything, on his part, to prevent a loss, is a sound one : among other things, it is his duty to provide his vessel with a competent master, and if he employs an incompetent or unskilful one, he must bear the loss which results from the ignorance, misconduct, or mistakes of such agent. But when the assured has performed his duty in this behalf, and has selected and employed a master of ordinary prudence and skill, it would seem that he had complied with his whole duty, and had fulfilled his part, not only of the letter but the spirit of his contract. When, therefore, the judge goes further and requires the insured not only to comply with his express warranty, by employing competent agents, but to warrant that his agent shall not, during the voyage, be guilty of any act of negligence, unskilfulness, or misconduct, he is imposing an obligation upon the assured not to be found in the contract, nor fairly to be inferred from it, and is making him responsible for the very acts and contingencies against which he seeks an indemnity.

The case of *Grim v. The Phoenix Insurance Company*, 13 Johns. Rep. 451, is the strongest case we have seen to establish the doctrine, that a loss by fire, proceeding from the negligence of the master and mariners, is not a loss within the policy, though barratry be one of the risks. That case was decided in 1818, and by a court of eminent ability. We will only remark upon it, that the facts upon which the judgment was founded presented a case of the grossest negligence, though the opinion of the court is placed on the general principle, that under-

writers have no concern with the competency or skilfulness of the master and crew, and *therefore*, any loss occasioned by the carelessness or negligence of these agents does not fall upon the underwriters. This conclusion is not, we think, warranted by the premises. We will only add, that it is somewhat remarkable that the supreme court of New York, and the court of king's bench, about the same time, from the same premises, arrived at conclusions exactly opposite. Whilst the court of king's bench consider the insertion of barratry as one of the perils insured against, as affording the strongest grounds for concluding that the underwriters intended to be responsible for every inferior degree of carelessness or misconduct, the supreme court of New York regard that circumstance as furnishing a violent presumption that every such negligence and misconduct as did not amount to barratry was not covered by the policy. The decision of the English court is now most generally sanctioned, but the reasons given for the decision in *Burk v. Royal Exchange Company* (the case referred to) are certainly not satisfactory, and the New York court was much better warranted, if the clause concerning barratry was to control the decision, in a different conclusion. The case in New York was afterwards reviewed by Judge Johnson, in *The Patapsco Insurance Company v. Coulter*, and the opinion was disregarded by the supreme court of the United States.

Upon the whole, without referring particularly to the other cases to which the appellants' counsel has cited us, we are disposed to adopt the views taken by Judge Story in *Waters v. The Merchants' Insurance Company*. No late case in New York has been cited from which it could be seen, whether that court would now adhere to an opinion running counter to the current of modern authorities; nor are the cases in Massachusetts of so decisive a character upon the precise question arising in this case, as to afford any obstacle to an ultimate adoption by that tribunal of the generally received doctrine. In Ohio, as we have seen, the supreme court of that state has readily yielded to the force of authority and reason, notwithstanding several opposing decisions of the same court upon the precise question. The doctrine is firmly established in England and in the federal courts. Under these circumstances, the case

being of the first impression here, this court cannot hesitate, especially as we venture to affirm that the doctrine is most consonant to the terms and spirit of the policy of insurance, and commended by every principle of sound public policy.

The second point made by the appellants is founded on the eighth plea. That plea alleges that, at the time of the loss, the boat was not in the possession or under the control of the master, officers, or crew, or any of the servants or agents of the owners, but under the control of certain workmen and laborers, with the privity and consent of the plaintiffs. The question is, whether this is any breach of the warranty, that the boat shall be competently provided with master, officers, and crew. It is certainly the duty of the owners to see that the vessel is repaired, when repairs are necessary, and it is not charged that repairs were in this case unnecessary, or that any unusual or illegal mode or plan of repairs was pursued; nor is it pretended that a boat placed on a dry dock, for repairs, should have a full complement of officers and crew, but it is urged that the owners should have at least some one to attend to their interests, and watch the safety of the vessel whilst it is undergoing repair. Now, if we are compelled to give the warranty a literal construction, the presence of a single watch, on the part of the owners, would surely not be a literal compliance with the warranty; for master, officers, and crew are all required. But to contend that a vessel on shore, or laid up on dock, must have the same number of hands which would be necessary to enable her to pursue a voyage, would be so manifestly against the true intent and meaning of the contract of insurance, that it is not urged. If the vessel was abandoned, on shore, to the hands of strangers, or was hauled on shore and converted into a shop or store, as was suggested in the argument at bar, such a state of facts would clearly discharge the underwriters, because it was not contemplated in the policy that the boat should be appropriated to any such purposes. But it is within the contemplation of both parties, that the boat will need repairs, and for that purpose, that it must be delivered over to the care and custody of the mechanic who undertakes the work; and it is not shown that it is customary or proper that the owner should appoint an agent to watch the boat or the workmen whilst in this

condition. If there be such a custom, it should be pleaded; *primâ facie*, I should suppose it unnecessary. Such is not the law or custom in relation to other bailments and if there be any custom which requires it, in the cases of boats or vessels, it should be shown.

The next point we will consider is the fifth point made in the appellants' brief, and involves the sufficiency of the additional plea. The same defence attempted to be set up in this plea, is also contained in some of the other pleas; but as the additional plea contains a more minute and perfect statement, and is not liable to some objections which are urged against the others, we shall consider this plea only, as embracing a statement most favorable to the appellants. This plea, in substance, alleges, that whilst the boat was on the St. Louis Dry Dock for repairs, the workmen unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly placed and spread a large quantity of picked oakum near to the said stove, by means of which the risk of firing the boat was increased, and whilst in this situation the loss happened. The defence is designed to embrace a mere variation or increase of risk, and a loss during, but not the consequence of such increase or change of risk. We are not disposed to deny the general proposition, that a variation or increase of risk will in some cases, perhaps in all cases where such increase of risk is the cause of loss, discharge the underwriters. It is upon this principle that a loss from deviation falls upon the owners. It is because such variation is against the letter or the intent of the policy. Thus, in the case of an insurance against fire on land, the house insured is described in the policy as a brick house separate and apart from other buildings, covered with tin, &c., and the insured builds a frame-house immediately in contact with the house insured. The frame building takes fire, and the fire is communicated to the house insured. Here has been an increase of risk, by the act of the insured, against the obvious intent and meaning of the policy, and the underwriters might well claim an exemption from such losses. *Stetson v. Mutual Fire Insurance Company*, 4 Mass. Rep. 330. So, also, where an insurance is effected on a voyage, the termini of which are designated in the policy, a deviation from the usual course

Notice of Loss. — Fraud. — Evidence of.

of such voyages discharges the underwriters, upon the principle that the risk is varied, whether increased or not, and is not the same contemplated by the parties.

Admitting this general principle, we are yet constrained to view the additional plea as a mere plea of negligence, and that it does not contain the allegations necessary to bring it within the class of cases in which a variation of risk is admitted to be a good defence. The plea alleges negligence and misconduct, setting forth the circumstances in which that negligence consisted. It avers, that whilst the boat was on the dry dock, the workmen engaged in making repairs unnecessarily and improperly made a fire in the stove, and unnecessarily and improperly spread picked oakum near said fire, and that this enhanced the risk of setting fire to the boat. Had the plea alleged that the boat was unnecessarily and improperly placed on the dock, and that, whilst in that situation, the workmen unnecessarily and improperly built a fire, &c., it might have been regarded as of the character designed, and the defendant must have taken issue upon it, or set up a special custom, authorizing the boat to be placed upon such dock. As it is, it is difficult to distinguish it from a special plea of negligence, and therefore involves the same question heretofore considered.

As the declaration contained no averment that the boat was competently provided with master, officers, and crew, and the defendants' demurrer reached back to the declaration, the judgment upon the demurrers should have been for the defendants.

The judgment of the circuit court is therefore reversed, and the cause remanded.

ALLEN S. WIGHTMAN vs. THE WESTERN MARINE AND FIRE
INSURANCE COMPANY.¹

(Supreme Court, Louisiana, July Term, 1844.)

Notice of Loss. — Fraud. — Evidence of.

Notice of a loss of property insured against fire, should be given with as little delay as the circumstances of the case will permit, to enable the insurers to take measures to

¹ 8 Robinson, 442.

Notice of Loss. — Fraud. — Evidence of.

protect their interests, and preserve any property saved from damage or loss, but the preliminary proof, required for the purpose of adjusting the loss, need not be presented so promptly.

The clause requiring preliminary proof is always construed liberally. Where notice of the loss was given immediately, a delay of nineteen days from the date of the fire is not unreasonable.

Notice of the loss of property insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party upon strict proof, the want of them should be specially pleaded. The fact of one of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, "if required by the books of accounts and other vouchers" of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called upon.

Marcheseau v. Merchants' Insurance Company, 1 Rob. 438, as to the evidence necessary to prove a loss under an open policy of insurance, affirmed.

To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be sufficient to convict the plaintiff on a prosecution for arson.

APPEAL from the commercial court of New Orleans, Watts, J.

The plaintiff appealed from a judgment in favor of the defendants.

Lockett & Micou for the appellant.

Maybin & Grymes, for the defendants.

GARLAND, J. This is an action on a policy of insurance against fire, to the amount of \$4,000, "on stock in trade, consisting of looking-glasses, frames and plates, clocks and jewelry," &c. in a store in Bienville Street in this city. The policy is in the usual form, with the usual conditions and hazards on it. The plaintiff alleges, that on the night of the 19th of April, 1841, the store in which his goods were contained was burned, and his loss amounted to \$3,800, which sum he claims of the defendants. The answer admits the execution of the policy, but denies all the other allegations in the petition, and especially denies that the said "plaintiff has complied with the conditions of said policy, particularly that condition which requires proof of his alleged loss, with a particular account of the same, and sustained by the proper vouchers," as required by the ninth condition of the policy. The answer proceeds to state, "that there are circumstances relating to said plaintiff, and the claim now in suit, which renders it the duty of said respondents to resist it, and to demand a rigid investigation, namely, that said plaintiff, in the fall of 1839, hired a room in a warehouse in the city of New York, into which he put wooden clocks, looking-

Notice of Loss. — Fraud. — Evidence of.

glasses, &c., and on the evening of, or about, the 17th of November, 1839, a fire broke out among his articles, which was believed at the time to have been caused by design, and for which said plaintiff was insured. That, on the night of the 13th of March, 1840, said plaintiff occupied a loft in the store of D. Felt & Co., in Chartres Street in this city, and on that night a fire broke out in his said loft, which caused much damage, and that said plaintiff was then insured at the Commercial Insurance Company of this city, and that the present claim is presented for loss by fire against these respondents." The ninth clause of the policy says, that "all persons assured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and as soon as possible, to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and also, if required, by their books of accounts and other proper vouchers. They shall also declare on oath whether any, and what other insurance has been made on the same property, and until such proofs and declarations are produced, the loss shall not be payable. Also if there appear any fraud or false swearing, the claimant shall forfeit all claim by virtue of this policy."

The evidence shows, that in the month of November, 1839, the plaintiff and two other persons or firms, occupied a store in Water Street in New York. He was engaged in the business of vending clocks, looking-glasses, &c., and occupied a part of the first loft and all the second, and had an insurance for one year on his goods. A fire broke out in the second loft, and caused considerable damage to the building and goods. He had some difficulty in settling with the company, and finally the claim was referred to appraisers or arbitrators, who allowed about one half of what was claimed. The president of the insurance company in New York says, that he had his suspicions about that fire, but what they were he does not tell us, and, we suppose, they could not have been very strong against the plaintiff, who, he says, is a man of good character, so far as he knows. He also consented to transfer plaintiff's policy from the store in Water Street to one in the Bowery, which would seem to imply some confidence in him. Plaintiff had been for

eight or ten years engaged in business, and bore the character of a punctual, steady man.

In the month of January or February, 1840, the plaintiff came to New Orleans with a quantity of looking-glass plates and frames, clocks, and other articles, for sale. He rented the first loft of a store in Chartres Street of Felt & Co., who occupied the first floor as a store, and used the upper lofts for a printing office. He took out a policy against fire, for two months, for about \$6,000, in the Commercial Insurance Company, on his stock in trade. A fire broke out in this store, in March, 1840, in the loft occupied by the plaintiff; but it is proved that it was in the night, and that the plaintiff had no key to the store that was known, he leaving every evening before the store on the ground floor was closed, and not returning until it was opened in the morning, and being obliged to pass through the lower store to get to where his wares were stored. A witness was examined, who was in this house when it was burned. He had the key, and, a short time before he discovered the fire, had been below to light a lamp or candle. He says that he heard some one on the steps and in the plaintiff's room below him, but he did not go to see who it was, although he knew he had, a short time before, closed the doors of the store, and had the key in his pocket, and no one slept in the plaintiff's store. The account given by this witness is rather loose and extraordinary, as, from it, the fire had progressed so much before he discovered it, although awake, that he was unable to get down the steps, and was obliged to make his escape through an upper window, sliding down by the water-spout. The witness says, that he has no doubt the fire was the work of an incendiary, but cannot say that the plaintiff was the guilty person. The president of the insurance company says, that although he and the officers of the company had suspicions as to something being unfair, yet they never could fix upon any facts that would enable them to resist the payment of the loss, and it was settled without a suit. This policy amounted to about \$6,000, and did not more than cover the loss.

In the month of November, 1840, the plaintiff again brought from New York to the city an assortment of looking-glass plates and frames, clocks, and other articles, invoiced to nearly

\$11,000. He rented the store No. 11 Bienville Street for one year, which was a large establishment, and not having use for the whole of it, he sub-leased a part of it to one Newcomb, a furniture dealer; to Treadwell, a commission merchant; and one McIntire, a cabinet-maker, slept in the house, and assisted Newcomb in his business. The plaintiff took out the policy sued on. Treadwell had a policy for \$4,000, in the defendants' office, on his goods. Newcomb had one for \$14,500, and McIntire had one on his tools, &c., for \$200; and other persons in adjoining stores had policies to the amount of more than \$18,000, all of which were settled by the defendants' without suit, so far as we are informed. During the winter, the plaintiff received some other goods from his establishment in New York, and from his correspondents, and sold a great portion of them. In the month of April, he proposed to return to the North, and spoke of leaving on different days, but did not do so. He had finally fixed on the 20th of April, as the day of his departure, and agreed with the witness, Newcomb, that they should meet that morning to make an inventory of the goods which he proposed to leave in his charge. The fire occurred about nine o'clock, on the night of the 19th of April, 1841. The evidence shows conclusively, that on that evening the plaintiff left the store about half-past six o'clock P. M., in company with two persons; he went with them to Canal Street, where one left him; with the other he went to the National Hotel, where he boarded. After tea, the two descended to the street, where they waited some short time for another person who had agreed to meet them; the party then proceeded to a billiard-table in Common Street, where they remained until the alarm of fire was given, with the exception of a space of time of from ten to fifteen minutes, that the plaintiff was absent from the room, saying, when he left, that he was going to one of the private apartments in the City Hotel for a necessary and urgent purpose, it being proved that he had been seriously affected with a diarrhœa for several days previously. McIntire says, that he closed the store himself about dark; he locked it, and afterwards returned and let his dog out, which he had left in the store; he again closed it; he saw nothing wrong at that time; he then carried the key to Newcomb's store in Royal Street,

where he left it. He then went to the billiard-room, where he knew the other parties were to be, and remained until the alarm of fire was given, and he went with them to the place. When the firemen and crowd assembled, they had to break open the doors of the store; and young Newcomb testifies, that the key was in his brother's store in Royal Street. The testimony of Banks is, that he was the owner of the store, upon which he had no insurance; that he arrived at the place soon after the alarm was given, where he met McIntire, and accused him of setting the house on fire, which he denied. Banks first said, that the fire began in the back part of the store, on the lower floor, and afterwards swore, it was on the second floor. The day after the fire he says that he met the plaintiff, who told him, that as the store was destroyed, the lease was annulled, and asked for his notes, to which he replied that he was in a great hurry. Banks then asserted, or insinuated, that the plaintiff set the store on fire; and several witnesses say that they never heard of such an accusation until he made it. It is evident that this witness testified with some feeling on the subject; and the judge below said, that he placed but little reliance on his testimony. It is proved, that McIntire is a man of good character, as is also the plaintiff, who had a store and clock manufactory in New York, where he had a clerk, who kept his accounts, and that he came to New Orleans with adventures of such articles as he manufactured, and some that he purchased, for purposes of speculation.

The evidence is voluminous, and we have endeavored to extract the most material part of it. The judge below gave a judgment for the defendants, principally on the ground that the value of the property was not sufficiently established, and that there was a strong suspicion of fraud on the part of the plaintiff; from which judgment the latter has appealed.

In this court, the counsel for the defendants insist that the plaintiff cannot recover, as the preliminary proof was not sufficient, and was not presented in due time. The same ground was taken in the court below; but as it was not pleaded specially, the judge passed it over without particular notice. The answer denies, in general terms, that the plaintiff has complied with the conditions, and made proof as required by the ninth

condition of the policy, sustained by proper vouchers. The clause in a policy that requires preliminary proof is always construed liberally. It is made for the purpose of satisfying the assurer that a loss has been sustained, and the proof is not expected to be strictly such as would be received in a suit pending, but such as will satisfy a reasonable mind of the correctness of the demand. Notice must be given according to the policy, and must be within a reasonable time. 7 Cowen, 645; S. C. 6 Prac. Abridgment Am. Cases, 210; 2 Phillips on Ins. 515. Although the policy stipulates that the notice shall be given "forthwith," we do not understand that to mean in an hour, or in any other very brief space of time, but without unnecessary delay. 12 Wendell, 452. And the giving notice of a loss is a different matter from making the preliminary proof, which may be subsequently presented, and generally requires some time to prepare. In this case it is stated that the notice was given "immediately," and the proofs presented nineteen days after the fire. No objection was made by the company, as to the notice, or delay in presenting the preliminary proof at the time, which goes far to show, that the defendants did not then consider the delay unreasonable; but they said that the loss would not be paid. We have once said, that the notice and proof required is somewhat in the nature of an amicable demand; and that to put a party upon strict proof of it, he should be called upon to do so by the pleadings. We are not prepared to say, that a delay of nineteen days for the purpose of preparing the proofs was unreasonable, notice having been given, and the defendants acting in the sale of such property as was saved from the flames. Notice of a loss should be given with as little delay as the *circumstances* of the case will permit, to enable the assurers to take all proper measures to protect their interests, and to preserve what property may be left from loss or damage; but the preliminary proof, which is presented for the purpose of adjusting the loss, need not be presented so promptly. This we believe to be the meaning of the ninth clause, or condition, of the policy. 10 Peters, 507.

The counsel for the defendants insists strongly, that as one clause of the ninth condition in the policy says that the account of loss shall be sustained, "if required, by their books of ac-

counts and other vouchers," that there is an implied warranty on the part of the plaintiff to keep books of account, and to be ready to exhibit them when called upon. As to the above clause creating a warranty, we are not disposed to assent to it; and, if it were so regarded, many policies would be avoided, both on marine and fire risks, as many who insure keep no books at all, their business not making it necessary. Warranties and special conditions in policies of insurance, as a general rule, must be strictly complied with, and we do not feel authorized to extend them by implication, as cases may often arise in which it would be difficult if not impossible to comply with them. The case before us is an example. The plaintiff had, for several years previous to this transaction, been engaged in business in New York, where he had a manufacturing establishment and a store. He had a clerk in his employ, and there kept his books. It was his practice to make an adventure each winter by shipping various articles to New Orleans, and coming with them himself, to sell for cash. It is not shown that he dealt on credit at all. He had his invoice so as to know the price his goods cost him, and, with that knowledge, he could sell them on such terms as he thought proper, and by examination ascertain what quantity he had on hand at any time. The fact is, that the plaintiff did keep a small book, not in a very regular manner, in which was put down the quantity and value of the goods he brought with him to New Orleans in November, 1840, and received afterwards; also the amount of cash received and remitted to New York. This book does not exhibit a very satisfactory account of the daily transactions of the plaintiff, but affords some insight into them, and as the clause does not specify what books are to be kept and produced, the one in the record will, in some degree, comply with it. But it does not appear that when the account of loss, with the proof in support of it, was presented, that the defendants required the production of any books to support it, nor have they since asked for them.

The next ground of defence is, that the amount of loss is not proved by sufficient testimony. That is a question we shall not examine now, but will refer to the doctrine laid down in the case of *Marchesseau v. The Merchants' Insurance Company*,

1 Rob. 441, 442, as to the evidence to show a loss under an open policy of insurance. Another ground of defence is, that the plaintiff was the cause of the loss, and the judge below seems to have been of that opinion. In coming to that conclusion, it seems to us that the judge has assumed as facts what we cannot consider as proved. He seems to take it almost as granted that the plaintiff set fire to his store in New York in November, 1839, and again to the one in Chartres Street in the spring of 1840. He also assumes that he had a key to the store in Bienville Street at the time of the fire in 1841. Of these facts we see no sufficient evidence in the record. It is certainly very remarkable that the plaintiff should have had his goods burned three times in about eighteen months, yet we cannot say that that of itself is a sufficient reason to say that he was the cause of the fire.

The counsel for the defendants contend, that in a case of this kind they are not bound to produce such evidence as would convict the plaintiff of the crime of arson if he were on trial for that offence. This we admit to be true, but we cannot assent to the other part of their proposition, that it is sufficient to raise suspicions of guilt, and thereby annul the policy, unless the plaintiff can establish his innocence. If the defendants can establish such circumstances as will, according to the established rules of our jurisprudence, fix a fraud upon the plaintiff, it will, in our own opinion, annul the policy. With the views and intentions we now have in relation to the case, we will not go into an analysis of the evidence, but will content ourselves with saying, that we are not satisfied with the judgment, and think that justice requires us to remand it for a new trial, and it would be more satisfactory to us if it shall be passed upon by a jury.

It is, therefore, ordered and decreed, that the judgment of the commercial court be annulled and reversed, and this case remanded for a new trial, with directions to the judge to conform in the trial thereof to the principles herein stated, and otherwise to proceed according to law, the appellee paying the cost of the appeal.

By-laws. — Misdescription. — Agent of Insured.

THE SUSQUEHANNA INSURANCE COMPANY vs. PERRINE.¹

(Supreme Court, Pennsylvania, July Term, 1844.)

By-Laws. — Misdescription. — Agent of Insured.

A person insured in a mutual insurance company becomes thereby a member thereof, and is bound by a by-law making the surveyor the agent of the insured and not of the company.

An omission to mention, in such an application, the buildings within ten rods, as required by the policy, although by the neglect of such agent, avoids the policy.

Molier v. The Pennsylvania Fire Ins. Co. 5 Rawle, 342, distinguished.

ERROR to the common pleas of Susquehanna county.

This was an action upon the case by Henry Perrine against the Mutual Insurance Company of Susquehanna county, to recover the amount of loss sustained by the plaintiff by reason of the burning of the stock in his tannery and his saw-mill. The act incorporating the defendants was passed the 21st of March, 1839, by which they were created a mutual insurance company. In pursuance of their charter and by-laws, the property of the plaintiff was insured to the amount of \$1,600; to recover which this action was brought.

The defence was that the application for the insurance was not in conformity with the by-laws of the company. One of those by-laws, which prescribed the conditions of insurance, was as follows:—

“ All applications for insurance must be made in writing, according to the printed forms prepared by the company. Such applications shall contain the place where the property is situated; of what materials it is composed; its dimensions, number of chimneys, fireplaces, and stoves; how constructed, and for what occupied; its relative situation as to other buildings; distance from each, if less than ten rods; for what purpose occupied; and whether the property is incumbered; by what, and to what amount; and, if the applicant has a less estate than in fee, the nature of the estate.

“ Such applications may be made either by the applicant or by a surveyor, and in all cases the insured will be bound by the application; for the purpose of which, such surveyor will be deemed the agent of the applicant.

“ The description of the property should be minute and particular, and the applicant given to understand that the surveyor

¹ 7 Watts & Sergeant, 348.

By-laws. — Misdescription. — Agent of Insured.

is his agent for such purpose, and that he will be held responsible for the correctness of the application."

The policy also contained the following provision : —

" This policy being made and accepted upon the representation of the insured, contained in his application therefor (to which reference is to be had), it is fully understood by and between the parties hereto, that if said representation does not contain a full and true exposition of all the facts and circumstances in relation to the condition, situation, value, and risk of the property hereby insured, so far as the same are material to the risk ; or if the situation of the property or the circumstances affecting the risk shall, during the time this policy would otherwise continue, be altered or changed, by or through the advice, consent, or agency of the insured, or his assigns, or otherwise howsoever, so as to increase the risk hereby assumed ; or if the said property shall be sold or conveyed in whole or in part, or if this policy shall be assigned without the consent of the said company ; or if any other insurance has been or shall hereafter be made upon said property or any part thereof, by said insured or his assigns, or for their use and benefit, without the knowledge and consent of said company ; then, and in every such case, the risk hereby assumed shall cease, and this policy shall become void."

The plaintiff's application for insurance and description of the property was drawn up by the surveyor appointed by the company, and was as follows : —

" No. 230. Application of Henry Perrine, in the county of Wayne, for insurance against fire in the Susquehanna Mutual Insurance Company for the sum of ——— dollars, to wit:

On saw-mill	\$600	Estimated value in cash, exclusive of land	\$900
Household furniture therein .		Estimated value	
Provisions and grain therein .		Estimated average value . .	
Barn and shed adjoining . .		Estimated value, exclusive of land	
Hay in the said barn		Estimated average value in winter	
Grain in the said barn		Estimated average value . .	
Stock in his tannery, such as hides	1,000	Estimated value in cash, exclusive of land	
Bark and goods contained therein		Estimated average value . .	2,500
Amount	\$1,600		
Rate at 15 and 20 per cent.			

By-laws. — Misdescription. — Agent of Insured.

"Amount of premium note, \$270. Six per cent. to be paid, \$16.20.

"Where situated. In Clinton, Wayne County, Pa.

"Of what materials, and whether new or old. The saw-mill is about 20 feet by 40 feet; has been recently rebuilt of wood.

"Size of building, number of chimneys, fireplaces, and stoves. The stock consists of bark, hides, etc.; the building is occupied as a leather factory, a steam-engine used for heating vats, &c. Building insured by the Wayne M. Insurance Co. for \$2,500.

"Relative situation as to other buildings, distance from each, if less than 10 rods, for what purpose occupied, and by whom. The building in which the stock is deposited is 40 by 90 feet; two stove-pipes, enter chimneys well secured. The boiler of the engine is carefully secured by a double arch, with a flue passing into a chimney.

"Whether incumbered, by what, to what amount; if not incumbered, say so. Judgment of \$1,200. HENRY PERRINE.

"June 2, 1841."

The proof on the trial was that the factory and saw-mill were within five rods of each other, and that the dwelling-house of the plaintiff and his barn were within ten rods of his factory.

The court below was of opinion that if the description given by the plaintiff to the surveyor of the company was fairly made, and the company afterwards acted upon that description and made the contract of insurance, they were bound by it.

Bentley & Williston, for plaintiff in error.

Kidder & Greenough, contra. It will be perceived that there was a blank description furnished by the agent of the company to the plaintiff; to the fourth matter of description there was nothing returned, and yet the company acted upon it and entered into the insurance; they should therefore be bound. 5 Rawle, 342. But fraud, concealment, or misrepresentation are matters of fact for the jury — are not to be presumed in a case like this. 4 Binn. 224. It would be fraudulent in the company to receive the application, the premium paid by the plaintiff, act upon it, grant the policy, and then say that the application was insufficient in a point which was just as apparent

then as it was made by the proof in the case. 4 Law Lib. 18; 2 Kent, 296.

The opinion of the court was delivered by

GIBSON, C. J. A regulation established by a by-law is not obligatory on a stranger; and, if the plaintiff were such, he would not be affected by the blunder of the company's surveyor, notwithstanding the terms of application prescribed by the conditions of insurance. But the act of incorporation provides that a party insured shall, *ipso facto*, be a member of the company; and on no other plan could a mutual insurance company be constituted, the object of the members being to share each other's losses for the general weal, and not to bear the risk of losses for a premium. The argument for the plaintiff is that he was not a member till the policy was sealed, and that, being a stranger during the preparatory steps, he was not bound at the time material to the question by the condition which exacts that, in receiving an application for insurance, the surveyor shall be the agent of the applicant. But the plaintiff was bound to know from the act of incorporation, according to which the company professed to deal with him, that he was going to become a member of it; and the presumption is that he made himself acquainted with its regulations, including the instructions to surveyors to require a minute and particular description of the property, and "give the applicant to understand that the surveyor is *his* agent for that purpose, and that he (the applicant) will be held responsible for the correctness of the application." What matters it then, that it was the surveyor who falsely filled up the application from the full and accurate information communicated by the applicant, when the latter was bound to know that the surveyor was acting in the business as his instrument and not as the instrument of the company? The case is doubtless a hard one, as the surveyor, who was entirely unfit for the place, had been selected for the service by the company. But then the plaintiff was not bound to employ him. He was at liberty to fill up the application with his own hand, and had he done so, the printed form would have been an unerring guide. He thought proper, however, to trust to the defective capacity of the surveyor, and it is our business to prevent the hardship of the case from running away with the law.

The plaintiff, then, is bound by the application as it was filled up, and it is faulty in a decisive particular. It was made a leading condition that it contain a description, not only of the place, materials, dimensions, and construction of the property, but also of "its relative situation as to other buildings, and distance from each, if less than ten rods." The principal building of the tannery was within twenty feet of the saw-mill; and though its contiguity materially increased the risk as to the whole, that fact was not stated. But it has been argued that as the property was insured entire, the condition has regard, not to particular parcels of it, but to other buildings in the neighborhood; or, to express it differently, buildings not included in the same policy. That construction rests on a single word, and it is too literal to be sound. The object was to have a disclosure of every material cause of danger, and whether it were internal or external could not be of consequence, provided a greater degree of risk were induced by it. It is that which regulates the premium, and it is therefore important to be known. Besides, it was in clear proof that uninsured buildings were within the distance. There has been, then, a fatal want of compliance with the particular requisite of the conditions, and this makes it unnecessary to examine the other points of defence, further than to say they would probably not be found tenable.

The case before us differs from *Moliere v. The Pennsylvania Fire Insurance Co.* in the important particular that the secretary, who, in that case, was the agent and man of business of the company, as a cashier is the agent and man of business of his bank, was the author of the misdescription, if there was one. A full, particular, and true description of the building had been verbally delivered to him according to the tenor of the company's printed proposals and conditions, which did not require it to be in writing; and in that particular, also, there is another material difference. Nothing required by the conditions, nor anything material to the risk, had been kept back; and from the perfect disclosure thus made, the secretary culled the description with which he thought proper to fill up the order and the policy, calling the building a brick ice-house, without noticing the fact that the brick walls were surrounded by a screen of boards a few feet distant, to protect them from the violent

 Waiver.

action of the heat or the external air. For want of a more appropriate designation, he chose to insure this nondescript and its appendage as a brick ice-house; and, as the walls were the principal, while the screen followed them as an accessory, who can say that he did not call it by its name? But if there were a true representation of every material circumstance, the name would be unimportant; for the parties might, as in fact was done, show the meaning of it by parol evidence, introduced on a very familiar principle, not to contradict the written description, but to explain a latent ambiguity in it. It was no more necessary to name the screen than it was necessary to name the roof, for each was equally a part of the building, and if the ensconcing of the brick walls in a wooden shelter were calculated to enhance the risk, the evidence was proper to show that it had not been concealed. But the ground on which the cause was put by the judge who delivered the opinion of the court, seems to me impregnable. A policy of insurance, like any other instrument, may be reformed for mistake of the scrivener; and had the company availed itself of the accidental misconception of its officer, it would have committed a fraud. But, in the case before us, all was done at the peril of the insured; and the defaults of the surveyor being his defaults, the company might conscientiously avail itself of them. The jury ought, therefore, to have been told that he was not entitled to recover.

 NEELY vs. THE ONONDAGA MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, October Term, 1844.)

 Waiver.

In an action upon a fire insurance policy conditioned to be void in case of the alienation of the property insured, it appeared that the company, having knowledge that an alienation had taken place, subsequently exacted payment of a deposit note given by the assured. *Held*, that this did not revive the policy.

THE case is stated in the opinion.

Forbes & Sheldon, for the plaintiff.

Lawrence & Fellows, for the defendants.

¹ 7 Hill, 49.

Waiver.

By the Court, BEARDSLEY, J. The seventh section of the defendants' charter is as follows: "When any property insured with this corporation shall be alienated by sale or otherwise, the policy shall become void and be surrendered to the directors to be cancelled; and upon such surrender the assured shall be entitled to receive his deposit note upon the payment of his proportion of all losses and expenses that have accrued prior to such surrender," &c. Laws of 1836, p. 177; Id. p. 44. The alienation in the present instance preceded the fire, and when that occurred the policy was a mere nullity.

It is said, however, that the facts set forth in the replication show a waiver of the forfeiture arising from the alienation, and that therefore the policy is still binding on the defendants. These are, that the defendants, with full knowledge of the alienation, and of the destruction of the plaintiff's dwelling-house by fire, exacted and received payment of a part of his deposit note for the purpose of meeting losses which occurred subsequent to the alienation.

Whether a policy, after having become void by the alienation of the property insured, can be restored to vitality by a mere act of waiver on the part of the underwriters, need not now be decided; for in my opinion, the replication fails to show that any such act has been done by the defendants. Although the plaintiff's policy became void by the alienation of the property insured, it does not follow that his deposit note was also void. On the contrary, until he surrendered his policy, and paid his proportion of all losses which accrued prior to such surrender, the deposit note remained obligatory upon him. He does not pretend that he surrendered his policy previous to the assessment in the replication; and he was therefore liable to pay his proportion of the losses for which that assessment was made. The replication shows that the defendants have enforced this liability; but their acts, instead of evincing an intention to affirm the existence of the policy, are perfectly consistent with their right to treat it as void.

The replication furnished no answer to the matter stated in the plea, and the demurrer should therefore be sustained.

Judgment for the defendants.

See *Smith v. The Saratoga Mutual Fire Ins. Co.* 3 Hill, 508; *ante*, p. 97, note. Also, note to *Carpenter v. Providence Ins. Co.*, *ante*, p. 137.

SAMUEL HOUGHTON & another vs. THE MANUFACTURERS' MUTUAL INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, October Term, 1844.)

Warranty. — Representation. — Examination after Work.

The representations of the assured in his application in this case, *held* to have been adopted by the policy as part of the contract of insurance.

It was *held*, further, that the answers, being termed "representations" in the policy, were to have the effect of representations rather than that of warranties. *Held*, also, that so far as the answers were material to the risk, their substantial truthfulness was a condition precedent to the liability of the defendants.

Whether the assured knew of facts and circumstances not stated, or inaccurately stated, where he stipulates that the representations made are true, "so far as known," is a question of fact for the jury.

Certain representations as to usages and practices observed in the building insured, *held* to amount to a stipulation that the same should be substantially continued.

In construing the representations, both as to existing facts and as to future precautions to be taken, good faith, as well as the terms of the policy, requires that there shall be a full and just, as well as true, exposition. A mere literal conformity is not always sufficient.

A representation having been made that an examination of the building was made thirty minutes after the cessation of work, *held*, that this required such examination in cases of extra work as well as in ordinary cases.

What constitutes a cessation of work is a question of fact for the jury.

THIS was an action on a policy of insurance against fire upon a woollen mill, the policy containing the following proviso: "If the representations made" in the application "do not contain a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the said applicants, and are material to the risk; or if the situation or circumstances affecting the risk thereupon shall be so altered or changed by or with the advice, agency, or consent of the assured, or their agent, as to increase the risk thereupon, without the consent of the company, this policy shall be void." Various questions were contained in the application, and a notice that it was expected that the answers should meet the requirements of the insurance office. One of these requirements was that an examination of the mill should be made thirty minutes after work; and it was stated in answer to one of the questions that the mill was worked from "5 o'clock A. M.

¹ 8 Met. 114.

to 8½ o'clock P. M. Sometimes extra work will be done in the night."

No proof was offered that an examination of the mill was made thirty minutes after the cessation of work on the occasions of extra work after 8½ o'clock P. M., though it was proved that such extra work was performed after the insurance was effected. Other points in the case appear in the opinion of the court.

C. Allen & Washburn, for the plaintiffs.

Newton, for the defendants.

SHAW, C. J. The contract of insurance against fire, as used and practised by the mutual insurance companies in this commonwealth, depending upon the operation and effect of the act of incorporation and the by-laws, and the policy and written representations in each particular case, is somewhat new and peculiar, and the rules applicable to it have not been very fully and definitely settled by judicial decisions. For this reason, as well as on account of its importance to the parties in point of amount, it is necessary to consider the present case with care. A nonsuit was ordered at the trial, subject to the opinion of the court upon various questions of law, which it was supposed would embrace the whole merits of the case. The court being of the opinion that in one particular the questions, decided as questions of law, should have been left to the jury, on the evidence, as questions of fact, the nonsuit is to be set aside and a new trial ordered.

Upon several questions of law discussed at the argument, the court have come to an opinion which it may be proper and convenient to the parties to state, in order to regulate the course of inquiry on another trial.

The court are of opinion that the policy, by the manner in which it refers in terms to the application and representations, does legally embody them as part of the contract, to the same effect as if they were recited and set forth at large in the policy.

That the application and the various answers contained in it being termed representations in the policy, are rather to be regarded as having the legal effect of representations than of warranties, as understood in the law of marine insurance, though partaking in some measure of the character of both.

Warranty. — Representation. — Examination after Work.

They are like representations, in requiring that the facts stated shall be substantially true and correct, and, so far as they are executory, that they shall be substantially complied with; but not like warranties in requiring an exact and literal compliance. It is enough, therefore, if these statements relied on as the basis of the contract are made in good faith and without intent to deceive; that they are substantially true and correct as to existing circumstances, and substantially complied with, so far as they are executory and regard the future.

With the qualification above mentioned, the fact, that the representations made in the application do contain a *just, full, and true* exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property insured, so far as the same are known to the applicants, and are material to the risk, is a condition precedent to the liability of the defendants; and if in any particular material to the risk they do not contain such *just, full, and true* exposition, the company are not bound.

The proviso in the policy, that it shall be void, if the application does not contain a *just, full, and true* exposition of all the facts, has this limitation; so far as the same are known to the applicants.

At the trial it was stated, as a conclusion of law, that if the applicants and assured were owners of the estate, they must be presumed to know certain facts respecting it. The court are of opinion that this was erroneous, and that the question whether the facts, if misrepresented, were known to the applicants, was a question of fact, to be left to the jury upon the evidence. The considerations referred to, as founding a legal conclusion of knowledge, are all fit and proper to be submitted to a jury; such as, that the assured and applicant is himself the owner of the property, and may be presumed to be acquainted with its condition; that the matter relates to things open and visible, things capable of distinct knowledge and not depending upon estimate, opinion, or mere probability; things in respect to which an owner is bound in honesty and good faith to know, takes upon himself to know, and usually does know; these and all other pertinent evidence bearing on the question are to be left to the jury, with directions that if they are satis-

fied from all the evidence, and can reasonably infer that the assured did know the fact as it really existed in regard to which misrepresentation is imputed, they are to find that they did know it; otherwise, not.

There is another clause in the policy to which the attention of the court was drawn at the argument, which is this: If the situation or circumstances affecting the risk upon the property insured shall be altered or changed, by or with the advice, agency, or consent of the assured or their agent, so as to increase the risk thereupon, without the consent of the company, the policy shall be void. The court are of opinion, that this was a stipulation and condition, without a substantive compliance with which, the company from the time of its happening, would cease to be bound by the contract. This provision binds the assured, not only not to make any alteration or change in the structure or use of the property, which will increase the risk, but prohibits them from introducing any practice, custom, or mode of conducting their business, which would materially increase the risk, and also from the discontinuance of any precaution, represented in the application to be adopted and practised with a view to diminish the risk. The clause in question, as well as the preceding clause, refers to the application and the representations contained in it. Taking this clause with the representations, we think the legal effect is, that so far as these representations set forth certain usages and practices observed at the factory, as to the mode of conducting their business, and as to precautions taken to guard against fire, it is not only an affirmation that the facts are true at the time, but, in effect a stipulation, that as far as the assured, and all those intrusted by them with the care and management of the property, are concerned, such modes of conducting the business shall be substantially observed, and such precautions substantially continue to be taken, during the continuance of the policy.

By a *substantial* compliance, we mean the adopting of precautions, if not exactly those stated in the application, precautions intended to accomplish the same purpose, and which may be reasonably considered equally or more efficacious. For instance, when it is stated that ashes are taken up in iron hods, it

would be a substantial compliance, if brass or copper were substituted. So, when it is represented that casks of water, with buckets, are kept in each story, if a reservoir were placed above, with pipes to convey water to each story, and found by skilful and experienced persons to be equally efficacious, it would be a substantial compliance.

But in construing those representations, both as to existing facts, and as to future precautions to be taken, a mere literal conformity and compliance would not be sufficient. Good faith, as well as the terms of the contract, requires that it shall be a *full* and *just*, as well as *true* exposition. These answers are to be construed in reference to the requirements of the office, and specified on the book of the application, and referred to in the question; and they are to be so construed as to meet these requirements, and conform to them, when it can be done consistently with the terms of the answer. For instance, the answer to No. 13 states that water-casks are placed in each room. This answer would be literally true, if a small vessel, having the shape and bearing the name of a cask, were so kept; but it would not be a full and just statement, nor a substantial compliance with the undertaking of the answer. That undertaking requires a substantial compliance, by keeping a cask of water of a size adapted to the required security, and holding a sufficient quantity to extinguish a sudden fire beginning to kindle in such story.

One other point was taken, respecting which an opinion was asked for and given at the trial. It related to the representation and the practice in respect to the examination of the factory. The representation was contained in the answer to the fourteenth question, as follows: Is a watch kept constantly in the building? If no watch is constantly kept, state what is the arrangement respecting it. *Ans.* No watch is kept in or about the building; but the mill is examined thirty minutes *after work*. This question referred to the requirements of the office, on the last of the representations, amongst which is this, viz.: that an examination will be had, say thirty minutes after work.

Question 21st was this: During what hours is the factory worked? The answer was, from 5 o'clock A. M. to 8½ o'clock P. M. Sometimes extra work will be done in the night.

Two questions were made at the trial. First, whether the representation of the usual practice amounted to any condition or stipulation that it should be continued. It was ruled at the trial, and the whole court are now of opinion, that as this examination was manifestly intended as a substitute for a constant watch; as it was one which the assured had it in their own power to make or cause to be made; as it was one of the precautions tending to secure the property against danger of fire and tending to its safety; it was one which, as a general practice, the assured were bound to follow; although an occasional omission, owing to accident, or to the negligence of subordinate persons, servants, or workmen, not sanctioned nor permitted by the assured, or by their superintendent, manager, or agent, might not be a breach or non-compliance.

The second question under this clause regarded the time at which the examination was to be made. The question, as understood at the trial, was this: Whether, if the factory work was continued during extra hours in the night, that is, after half-past eight p. m., the examination should be made at half an hour after the cessation of actual work, or half an hour after the time fixed in the twenty-first answer, as the usual hour of the cessation of work? On this question, considering the purpose of the examination, and considering that the object of the examiner would be, by the sense of sight or smell, to detect any latent fire, or fire beginning to kindle, arising from sparks from the extinguished lamps, spontaneous combustion, friction of machinery, or otherwise; as this could be best accomplished after the mills were stopped, and the operations of the factory for the night had ceased, and the persons employed in it had left, I was of opinion that the examination must be made at thirty minutes after the cessation of the actual work of the factory, and that an examination thirty minutes after the time fixed by the twenty-first answer, as the usual time for closing work, if the factory did continue in operation, was not a substantial compliance with this stipulation. And the court are of opinion, that this direction, in the case supposed, was right, and that such is the correct construction of the contract. The answer had represented that the usual hour of the cessation of work was half-past eight, yet having represented that the factory would some-

Warranty. — Representation. — Examination after Work.

times be worked during extra hours in the night, they had a right so to work without impairing the contract. But if they thought fit, for any cause, to change the hour of work, so that it should continue to a later hour in the night, they must see that the examination be made at thirty minutes after the actual cessation of work.

But another question is now presented, which was not distinctly raised at the trial and in regard to which the evidence was not fully reported; and it is this: What is the cessation or termination of work; or, in other words, what is the meaning of *thirty minutes after work*, within the meaning of the answer to the fourteenth question? As there is to be a new trial on other grounds, we think it proper to state the opinion of the court upon this point; although, through misapprehension of the counsel, or of the court, or otherwise, it was not raised at the trial, or presented on the report.

The question as to what is a termination of work, within the meaning of this contract, is partly a question of law and partly a question of fact. The intentions of the parties, if they can be ascertained, are to govern; and these are to be learned from the language used construed in connection with every part and clause in the contract, the subject matter respecting which they are used, and the obvious purposes of each stipulation.

That the assured were bound to make an examination, at thirty minutes after work, is the construction of law on the contract; what is the cessation of work, is a question of fact for the jury depending upon the circumstances, and having in view the object and purpose of the stipulation, which was, to have an examination at such time as will conduce to the safety of the building. As some of the sources of danger are the continuance of fires and lights, and the friction of machinery, so long as the general work of the factory and operation of the machinery continues, a jury must find that the work had not then ceased, and could not be warranted in finding otherwise. If, on the contrary, the gates were shut, the machinery all stopped, the fires and lights extinguished, and the operatives generally retired, it could hardly be said that the work had not ceased, although one or two persons should remain to do something which should create no danger of fire. The fact to be

looked to is not that the persons employed have all left, or that the lights are all extinguished, or that the machinery has wholly stopped, but the termination of the time during which the factory is worked; and this is an inference of fact, which may be influenced more or less by all these considerations.

Now between the full operation of the factory, and the entire cessation of work, extremes may be supposed on either hand, respecting which there could be no doubt. There may be various intermediate stages, in which it would be the duty of the jury to determine, upon the particular combination of circumstances, whether they constituted a cessation of working of the factory or not. If the general work of the factory has ceased, although a single machine may remain in operation for a special purpose, we think a jury should be instructed, that if such machine should cause no danger of fire, the examination should be made at thirty minutes after the cessation of the general work, and not after the stopping of the particular machine; and this the rather because the contract stipulates but for one examination after the cessation of the general work, being apparently most for the interest of both parties, may be presumed to be most conformable to their intentions. And so in the various cases it will be for the jury to say, under the direction of the court, taking into view the purpose of the examination, and the nature of the work done, and the risk attending it, whether, within the meaning of this contract, the work of the factory, in the particular case, had terminated.

New trial ordered.

THE ILLINOIS MUTUAL FIRE INSURANCE COMPANY, plaintiffs
in error, vs. THE MARSEILLES MANUFACTURING COMPANY,
defendants in error.¹

(Supreme Court, Illinois, December Term, 1844.)

Practice. — Concealment. — Insurable Interest.

In an action by a manufacturing company against an insurance company upon policies of insurance, the defendants filed their plea of non-assumpsit, with notice of special matter to be given in evidence under the plea, to wit: that the plaintiffs had no title in fee sim-

¹ 1 Gilm. 236.

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ple, or otherwise, to three eighths of the premises upon which the insured buildings were erected; that the fact that they had a less estate than the whole in the premises was fraudulently concealed from the defendants, in making their application for insurance; that, at the time the policies were issued, and of the making of the premium notes, the premises were incumbered by mortgage, and judgments, &c., upon said three eighths; that certain mechanics' liens for the erection of said buildings, amounting to eighteen or twenty thousand dollars, also existed; that said facts were not set forth and disclosed in either of the applications for insurance, and that the defendants had no knowledge of such incumbrances at the time of issuing the policies, which concealment avoided the policies under the 13th section of the act entitled "An Act to incorporate the Illinois Mutual Fire Insurance Company;" that subsequently to the issuing of said policies, the plaintiffs erected and added to one of the saw-mills insured a furnace, with open boiler, for boiling or preparing shingle blocks for the machine, thereby increasing the risk or hazard of the insurers, without any additional premium therefor; that said applications were false and untrue in regard to the value and extent of the flouring-mill insured, the number of stones ready for the manufacturing of flour, &c.; and that the insured buildings were intentionally destroyed by fire by a person at that time a member of the plaintiffs' company: *Held*, that, under this plea and notice, the defendants had a right to avail themselves of any matter of defence arising from the illegality of the insurance; from a non-compliance with some express or implied warranty or condition; from the want of a proper interest; from misrepresentation or concealment; or from a performance on their own part of the terms of the policies.

Policies of insurance are within the provision of the 12th section of the practice act, and may be read in evidence to the jury without proof of their execution, unless it be denied by plea verified by affidavit.

By the act incorporating the Illinois Mutual Fire Insurance Company, the charter itself is made a part of the contract of insurance, and the insured being, by the act, members of the company, cannot plead ignorance of its provisions.

At common law, a policy of insurance is considered in the nature of a contract of indemnity, and though a declaration thereon does not contain any direct averment of interest, yet a general averment would import an insurable interest, which must be proved at the trial.

If the insured in this company, at the time of the insurance, had a less estate than an unincumbered estate in fee simple in the premises, it was their duty to disclose the fact to the insurers. The omission, therefore, to state in their application that they had such an estate in fee simple, amounts to a warranty that their title is such as is required by the charter. Such warranty operates as a condition precedent to the assured's right of recovery, and a recovery cannot be had upon the policy, without an averment, supported by proof, that such condition has been complied with.

In an action on a policy of insurance against fire, the plaintiff, on the trial, must prove that he had an insurable interest in the premises, before he can recover.

Where the possession of land alone is relied upon for any legal purpose, in the absence of paper title, it should be an actual occupancy of the premises in question.

ASSUMPSIT in the Madison circuit court, brought by the defendants in error, upon two policies of insurance. The cause was tried at the May term, 1843, before the Hon. James Temple and a jury. Verdict for the plaintiffs below, damages assessed at \$10,000, and judgment rendered on the verdict. The various proceedings and testimony in the cause are very fully set forth in the opinion of the court.

S. G. Bailey & N. D. Strong, for the plaintiffs in error.

W. Martin & J. Butterfield, for the defendants in error.

The opinion of the court was delivered by

YOUNG, J. This was an action of assumpsit commenced by the defendants in error against the plaintiffs in error, in the Madison circuit court, at the September term, 1842, upon two policies of insurance, for the destruction and loss by fire of a flouring-mill, two saw-mills, lath-mill, and a shingle-machine, situated in the town of Marseilles, and county of La Salle, and which were insured as the property of the defendants in error, by the plaintiffs in error, to the value of \$10,000. The *præcipe* was filed on the 6th day of September, 1842; a summons issued thereon on the same day, returnable to the September term, 1842, which was executed on Benjamin F. Lang, as president, and Moses G. Atwood, as secretary of the Illinois Mutual Fire Insurance Company, by the sheriff of Madison county, by delivering to each of them a copy on the 8th day of September, 1842.

On the 12th of May, 1843, the Marseilles Manufacturing Company filed in the clerk's office of the said circuit court two several declarations in assumpsit against the Illinois Mutual Fire Insurance Company; the first upon policy No. 763, by which the sum of \$8,000 was insured on the flouring-mill; and the second on policy No. 467, and dated the 22d day of February, 1841, by which the sum of \$2,000 was insured on the two saw-mills, the lath-mill, and shingle-machine. Each declaration contained two counts; the first concluded with an *ad damnum* of \$12,000, and the second with damages stated at \$3,000. At the May term, 1843, and on the 23d day of the month, the defendants below obtained a rule upon the plaintiffs below to show cause, by the Monday following, why one of said declarations should not be stricken from the record in the suit; and on the 25th of the same month leave was given to the plaintiffs below to amend their declaration. The amendment was made by consolidating the two declarations filed in the cause into one, so as to make it a declaration with four counts, two upon each policy, by striking out the *ad damnum* of the first, the caption of the second, and by changing the amount of the damages, at the conclusion of the second, from \$3,000 to \$12,000.

The declaration as amended, contained two counts on policy No. 763, issued by the plaintiffs in error to the defendants in error, by which the flouring-mill was insured for the sum of \$8,000; and two counts on policy No. 467, by which the two saw-mills, lath-mill, and shingle-machine were insured for the sum of \$2,000. The first policy is dated December 27, 1841, and the second, February 22, 1841, each to continue for six years from their respective dates. The plaintiffs below also averred the making of the policies, their interest in the property insured, the loss thereof by fire on the 19th of April, 1842, notice to the defendants below, within the next thirty days, that the defendants below had refused to rebuild the property destroyed or to pay the sums insured, and concluded to the damage of the plaintiffs below of \$12,000.

On the 29th of May, 1843, the defendants below filed their plea of non-assumpsit, with notice of special matter to be given in evidence under said plea at the trial, to wit: That the plaintiffs below had no title in fee simple or otherwise to three eighths of the premises upon which the insured buildings were erected; that the fact that the plaintiffs below had a less estate than the whole in the premises was fraudulently concealed from the defendants below in the applications for insurance; that at the times of issuing the two policies, and the making of the two premium notes, the premises were incumbered by a mortgage and judgments against Lovell Kimball, previous to his conveyance to the plaintiffs below of three eighths of the real estate upon which the insured buildings were erected; that certain mechanics' liens for the erection of said buildings, amounting to eighteen or twenty thousand dollars, also existed against the plaintiffs below, and were incumbrances upon the said premises; that said facts were not set forth and disclosed in either of the applications for insurance, and that the defendants below had no knowledge of such incumbrances at the time of issuing the policies thereon; which concealment, the defendants below contend, avoids both the policies, under the 13th section of the act entitled "An Act to incorporate the Illinois Mutual Fire Insurance Company;" that, subsequent to the issuing of said policies, the plaintiffs below erected and added to one of the saw-mills insured a furnace, with open boilers, for

boiling or preparing shingle blocks for the machine, thereby increasing the risk or hazard of the insurers, without any additional premium therefor; that said applications were false and untrue in regard to the value and extent of the flouring-mill, the number of stones ready for the manufacturing of flour, &c.; and that the insured buildings were intentionally destroyed by fire by a person at that time a member of the said Marseilles Manufacturing Company, &c.

On the 30th of May, 1843, the defendants below filed the affidavit of Moses G. Atwood, secretary of their company, and moved the court for a continuance, for the following reasons: That although this suit was commenced before the September term, 1842, no declaration was filed until the 12th of May, 1843, which was the last day on which it could be filed under the statute; that the defendants below could not safely go to trial without the evidence of Ebenezer Jackson, by whom they expected to prove the incumbrance of the insured premises by mortgage, as specified in the notice under their plea of non-assumpsit; that Jackson resided in Middletown, in the state of Connecticut; that the defendants below had no knowledge of the existence of said mortgage by Kimball to Jackson for \$15,000, until after the destruction of the said insured buildings by fire. Also, that they expected to prove by William M. True and Amasa G. Cook, of La Salle county, a distance of two hundred and twenty-five miles from the place of holding court in the said county of Madison, that after issuing of the said two policies of insurance, and a short time previous to the destruction of the said insured buildings by fire, the plaintiffs below erected adjoining to one of the saw-mills a steam furnace, by which the risk was greatly increased, and that fire had, previously to the destruction of the insured buildings, been communicated to the saw-dust from said furnace, and came very near destroying said buildings. Also, that they expect to prove by said Cook the existence of one of the mechanics' liens mentioned in said notice, for about \$300; that the defendants below had no knowledge of said mechanics' liens, until the buildings were destroyed; that they expect to prove by the evidence of the recorder of La Salle county, who resides at Ottawa, that the plaintiffs below had no title in fee simple or

otherwise to three eighths of the premises upon which the insured buildings were erected; that they expect to prove by Lorenzo Leland, clerk of the circuit court of La Salle county, who also resides at Ottawa, the existence of certain judgments against Lovell Kimball in that court, which were liens upon the real estate upon which the insured buildings were erected, previous to the conveyance of the same by Kimball to the plaintiffs below, to an amount of about \$1,700; that the amendment of the first declaration on the policy of \$8,000, by incorporating with it the second declaration for \$2,000, was a material and substantial amendment, which was calculated to take the defendants below by surprise; for which last mentioned reason, and for the further reason that sufficient time was not allowed to take the depositions of the said witnesses, or to procure their attendance by subpœna or otherwise, the defendants below insisted that they were entitled to a continuance. The motion for a continuance was overruled, and an exception thereon taken to the opinion of the court.

On the 1st day of June, 1843, and during the continuance of the said May term of the court, a motion was made on behalf of the plaintiffs in error, upon the affidavit of Moses G. Atwood, to rule the defendants in error to file security for costs, on account of the alleged insolvency of the Marseilles Manufacturing Company, which motion was also overruled by the court.

On the 20th of June, 1843, the cause came on for trial by a jury, who having heard the evidence, arguments of the counsel, and instructions of the court, returned a verdict for the plaintiffs below for \$10,000 damages. The defendants below then entered their motion for a new trial for the reasons following, to wit: —

1. Because the court refused to give the instructions asked for by the defendants below.
2. Because the court gave the instructions prayed for by the plaintiffs below.
3. Because the court admitted improper evidence on the part of the plaintiffs below.
4. Because the court excluded proper evidence offered by the defendants below.

5. Because the jury gave excessive and unreasonable damages, and

6. Because the jury found contrary to the evidence.

This motion for a new trial was overruled by the court on the 11th of July, 1843, and a judgment rendered upon the verdict in favor of the plaintiffs below for \$10,000 and costs.

On the 11th day of November, 1843, the plaintiffs in error filed in the clerk's office of the circuit court a long bill of exceptions, setting forth the material facts, and opinions of the court, which occurred during the progress of the trial, and upon which they expect a reversal of the judgment in this court; but as most of the matters preserved are immaterial in the present controversy between the parties, I will omit to state them, and will notice such portions of the record only as appear necessary to a proper understanding and determination of the cause as submitted by the pleadings.

James H. Woodworth, the first witness sworn on the part of the plaintiffs below, testified that he had no interest in the event of the suit, except as a creditor of the Marseilles Manufacturing Company; that he was an officer of that company at the time of the loss of the insured property, and expects that his dividend as a creditor of the company would be increased by a recovery in this suit; thinks the Marseilles Manufacturing Company will be able to pay its debts, if it should fail in this suit.

Benjamin F. Long, as president, and Moses G. Atwood, as secretary of the Illinois Mutual Fire Insurance Company, were next examined on the part of the plaintiffs below, by whom they proved the execution of the two policies, No. 467 and 763, and who further testified that James H. Woodworth, the witness, made the applications for insurance as agent of the Marseilles Manufacturing Company, in both cases. The policies were then offered as evidence to the jury, and objected to by the defendants below; the court overruled the objection, and the policies were read as evidence on the part of the plaintiffs below, and an exception taken by the defendants.

The application for insurance on which policy No. 467 was issued is substantially as follows: —

“Application of the Marseilles Manufacturing Company, of Marseilles, in the county of La Salle, for insurance against fire,

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by the Illinois Mutual Fire Insurance Company, for the sum of \$2,000, to wit: On two saw-mills, one lath-mill, and one shingle-machine, valued at \$3,000, exclusive of land — said mills and machine are situated in the town of Marseilles, and are built of wooden materials — they are all under one roof covering a building forty-five feet square — a stove sometimes used in it during the winter, the pipe passing through the roof, secured by sheet iron — said mills stand upon the Illinois River, and are propelled by water — a flouring-mill stands twenty feet from the buildings — no other within one hundred feet. Dated Marseilles, February 12th, 1841.

“JAMES H. WOODWORTH, *Treas.*”

The application for insurance on which policy No. 763 issued is as follows: —

“Application of the Marseilles Manufacturing Company of Marseilles, in the county of La Salle, for insurance against fire, by the Illinois Mutual Fire Insurance Company, for the sum of \$8,000, to wit: On one flouring-mill valued at \$30,000 exclusive of land — said building is situated in the town of Marseilles, and is built of stone and wooden materials. It is situated on the bank of the Illinois River, and propelled by water — is 45 by 70 feet on the ground, four stories high, with an attic — the fore-bay and basement story are of stone, and the remainder of wood — contains eight runs of $4\frac{1}{2}$ feet French burr stones — two smut-mills, screens, bolts, &c., complete for the said eight runs of stones — and all other fixtures necessary for country and merchant work. There is no fire kept in said mill — the saw-mills already insured by the company are about thirty feet from said mill, but no other building within one hundred feet.

“R. P. WOODWORTH, *Pres't.*”

“JAMES H. WOODWORTH, *Treas.*”

“Dated December 18th, 1841.”

There is on each of said applications a memorandum to the effect following: “If insurance be wanted on more than one building in the same policy, the amount on each must be named — also, the amount of furniture, goods, &c., must be separately named. Not more than two thirds of the estimated value of any building will be insured — nor more than half the

amount of furniture, stock in trade," &c. No. 467 is indorsed "\$2,000 at 11 per cent., approved February 22, 1841." Benj. F. Lang, Pres't—and No. 763, "\$8,000 at 11 per cent., approved December 27th, 1841." Benj. F. Lang, Pres't.

James H. Woodworth, having been recalled, further testified, that the buildings described in the policies were destroyed by fire on the 19th of April, 1842; that the property described in policy No. 467 was worth \$3,000, and that described in policy No. 763, \$20,000; that the flouring-mill had eight runs of stones complete, and that the plaintiffs below were the owners of the property insured; that he, the witness, as secretary, and his brother, R. P. Woodworth, as president of the Marseilles Manufacturing Company, made the applications Nos. 467 and 763, for insurance to the Illinois Mutual Fire Insurance Company; that the mills insured were situated on water lot No. 2, on part of section nineteen (19), township (33), north of range five (5), west of the third principal meridian; that he, the witness, was also the agent of the plaintiffs in error to receive propositions for insurance; that he, as such agent, received the propositions numbered 467 and 763, and forwarded them to the secretary of the plaintiffs in error, and had at that time in his possession a copy of the charter of the Illinois Mutual Fire Insurance Company; that the applications were filled up by him, and that he received the premium notes on the two policies; that he owned three hundred shares of stock in the Marseilles Manufacturing Company at the time of the insurance, but sold out his stock before the trial in this suit; that he gave notice of the loss of the insured buildings by fire, as agent of the defendants in error, to the secretary of the plaintiffs in error, within thirty days from the time of its occurrence.

Benjamin F. Lang testified, that the plaintiffs in error refused to rebuild the property destroyed by fire; that the agents of the plaintiffs in error had only received proposals to insure, and forward them to their office, and if insurance was effected, to receive the premium note, and the percentage, and to deliver over the policy to the insured; that at the time of the loss the plaintiffs in error held premium notes of the company, amounting to \$80,000 or \$100,000. The witness then presented blank forms of the power of attorney, and instructions to the agents

of the Illinois Mutual Fire Insurance Company, which are not necessary to be stated, but which, in the general, require them to act according to the provisions of the charter, with such specific directions under the by-laws and regulations as seem to be necessary to insure a proper execution of their duty under the statute creating the company.

Lewis Kellenberger was then introduced as a witness by the defendants below, who testified, that the insured property was situated on water lot, or block No. two (2), on the northwest quarter of section nineteen (19), township thirty-three (33), north of range five (5); that he knows its location from inspecting the records of the town of Marseilles; that he was one of the agents of the plaintiffs in error; that his practice was to receive applications, forward them to the Mutual Fire Insurance Company, receive the policies, and deliver them to the insured upon the payment of the percentage, and delivery of the premium note, and then forward the premium note and percentage to the secretary of the company.

The defendants below, for the purpose of showing defects in the title of the plaintiffs below, and also that they had a less estate than fee simple in the lot and lands upon which the insured buildings were erected, at the time the insurance was effected, produced and offered to read in evidence to the jury copies of the following described deeds, to wit: —

No. 1. From William Munson and Rachel Munson to Robert P. Woodworth and Lovell Kimball, bearing date the 11th of September, 1834, for the south half of the east half of the southeast quarter of section thirteen (13), in township thirty-three (33), north of range four (4), east of the third principal meridian, containing forty acres; also, forty acres of the west part of the north fractional half of section nineteen (19), in township thirty-three, north of range five (5), east of the third principal meridian. Both of these tracts of land are parts of tracts granted by congress to the state of Illinois for canal purposes, and donated by the state to Rachel Hall, now Rachel Munson, one of the ladies captured by the hostile Indians during the Black Hawk war. This deed was acknowledged before Joseph Cloud, a justice of the peace of La Salle county, on the 11th of September, 1834, and subsequently recorded in the

recorder's office of said county, in Deed Book A, page 267, as appears by the certificate of J. W. Armstrong, recorder, dated 6th June, 1843.

No. 2. A deed from Lovell Kimball, and Permelia his wife, and Robert P. Woodworth, and Ann his wife, to Ebenezer Jackson, of Middletown, Connecticut, for the one undivided eighth part of water blocks Nos. 1, 2, 3, 4, 5, 6, in the town of Marseilles, La Salle county, being parts of sections No. thirteen, eighteen, nineteen, and twenty-four, in township thirty-three (33), north of ranges four (4) and five (5), east of the third principal meridian; also, the one undivided eighth part of a strip of land purchased by the grantors from James Galloway, on the margin of the Illinois River, opposite the town of Marseilles, four rods wide at one end, and eight rods wide at the other; also the undivided eighth part of four acres of land opposite the said town of Marseilles, near and adjoining the dam erected by the grantors and the other proprietors of Marseilles, across the Illinois River; and acquired under a writ of *ad quod damnum*, issued from the county commissioner's court of La Salle county; also, the undivided eighth part of all the interest of the grantors in and to the water-power owned by them in the said town of Marseilles, or in any manner appertaining to the aforesaid water blocks, Nos. 1, 2, 3, 4, 5, and 6, or to sections Nos. thirteen, eighteen, nineteen, and twenty-four; also, the undivided eighth part of any water-power or privilege the grantors may have, on account of their ownership of the four acres of land above mentioned; also, the undivided eighth part of any water-power or privilege, which they may be entitled to on account of their ownership of the strip of land purchased from Galloway. This deed is dated the 15th day of July, 1838, was acknowledged by Kimball and wife before J. Otis Glover, a justice of the peace of La Salle county, the 16th of July, 1838, and by Woodworth and wife before F. A. Howe, a justice of the peace for Cook county, on the 20th of July, 1838, and recorded in the recorder's office of La Salle county, in Deed Book No 1, commencing on page 204.

No. 3. A deed from the last grantors to Josiah Lawrence, of Cincinnati, for the undivided eighth part of all the lands, lots, premises, water-power, and privileges mentioned and described

in deed No. 2, to Ebenezer Jackson, of Connecticut. This deed is dated the 16th of July, 1838, was acknowledged by Kimball and wife before J. Otis Glover, a justice of the peace for La Salle county, the 16th of July, 1838, and by Woodworth and wife before F. A. Howe, a justice of the peace for Cook county, on the 20th of July, 1838, and recorded in the recorder's office of La Salle county, in Deed Book No. 1, commencing at page 211.

No. 4. A deed from the same grantors to Gurdon S. Hubbard, of Chicago, for an undivided eighth part of all the lands, lots, premises, water-power, and privileges mentioned and described in deed No. 2, to Ebenezer Jackson, as aforesaid. This deed is dated the 15th of July, 1838, was acknowledged by Kimball and wife before J. Otis Glover, a justice of the peace of La Salle county, on the 16th of July, 1838, and by Woodworth and wife before F. A. Howe, a justice of the peace for Cook county, on the 20th of July, 1838, and recorded in the recorder's office of La Salle county, in Deed Book No. 1. commencing at page 207.

No. 5. A deed from Lovell Kimball and wife to the Marseilles Manufacturing Company, dated the 11th of May, 1840, for two undivided eighth parts of so much of water lot No. 2, designated on the map of the town of Marseilles, as lies east of a line to be drawn north and south across said lot, fifteen feet west of the west end of the flouring-mills now building on said lot by said Kimball, together with two undivided eighth parts of the water-power, saw-mills, lath-mills, and shingle-machine, and their appendages, now in operation on said lot; also two undivided eighth parts of the flouring-mills now erecting on said lot; also, three undivided eighths of the water-power and premises before described, as is vested in them by virtue of three several deeds, to wit: one from Gurdon S. Hubbard, one from Ebenezer Jackson, and the other from Josiah Lawrence to the said Kimball. This deed contains a great many covenants, stipulations, and conditions between the contracting parties which are not necessary to be stated, with the exception of a stipulation in relation to the completion of the flouring-mill, which is in the words following, to wit: "And they (the grantors) do further covenant and agree to furnish and

complete the said flouring-mills according to a certain contract existing between Lovell Kimball and Amasa G. Cook, as soon as said Cook is bound by said contract to complete the same," &c. This deed was acknowledged by Kimball and wife before Amos Holsey, a justice of the peace for La Salle county, on the 11th of May, 1840, and recorded in the recorder's office of said county, in Deed Book No. 4, commencing on page 356.

No. 6. A deed from Robert P. Woodworth and wife to the Marseilles Manufacturing Company, dated the 11th of May, 1840, for three undivided eighth parts of so much of water lot No. 2 as is designated on the map of the town of Marseilles, lying east of a line to be drawn north and south across said lot, fifteen feet west of the west end of the flouring-mill then building on said lot by Lovell Kimball, together with the undivided eighth part of the water-power, saw-mills, lath-mills, and shingle-machine, and their appendages, then in operation on said lot; and also, the undivided eighth part of the flouring-mill, appurtenances, &c. This deed was acknowledged by Woodworth and wife before Amos Holsey, a justice of the peace for La Salle county, on the 8th of December, 1840, and recorded in the recorder's office of said county, in Deed Book No. 6, at pages 59 and 60.

To the reading of which said several copies of deeds as evidence to the jury, the plaintiffs below objected; the objection was sustained by the court, and an exception taken to the opinion by the defendants below.

The defendants below, for the purpose of showing an incumbrance upon the real estate upon which the insured buildings were erected, then produced and read in evidence to the jury, without objection, the copy of a mortgage from Lovell Kimball and wife to Ebenezer Jackson, of Middletown, Connecticut, dated the 20th of April, 1839, for five sixteenths of the water power and water blocks on the Illinois River, in the town of Marseilles, La Salle county, as described on the recorded plat of said town, together with the dam, saw-mills, and flouring-mills thereon, &c. This mortgage also conveys an interest in several leases, and tracts of land, which need not be recited, as they are not at all material in determining the issues between the parties. The consideration expressed by the mortgage, as

having been received by the mortgagors, is stated at \$15,000. This mortgage was acknowledged by Kimball and wife before Orville Cone, a justice of the peace for La Salle county, on the 22d of April, 1839, and recorded in the recorder's office of La Salle county, in Deed Book No. 2, commencing on page 224.

The defendants below then offered to read in evidence to the jury a copy of the answer of Lovell Kimball to the bill in chancery, filed against him and the Marseilles Manufacturing Company by Amasa G. Cook, in the La Salle circuit court, for the purpose of enforcing a mechanic's lien against the lands upon which the insured buildings were erected, in which he, Kimball, admits, that he had been the owner of five eighths of the lot mentioned in the complainants' bill, but had disposed of the same to the Marseilles Manufacturing Company, and denies that Cook performed the work either within the time, or in the manner mentioned in the agreement, &c. This answer was sworn to before the clerk of the La Salle circuit court the 1st of January, 1842, and contained a clause to this effect: "And the defendant (Kimball) further answering, saith, that the mortgage to the said Ebenezer Jackson in said bill mentioned on the premises, for the purpose in said bill mentioned, is real and not colorable, as pretended by said bill," &c. Kimball afterwards, on the 21st of May, 1842, obtained leave to amend his said answer, and thereupon amended by striking out the above clause. The plaintiffs below objected to the reading of the answer and amendment to the jury; the court sustained the objection, and the defendants below took an exception to the opinion.

The defendants then offered to read as evidence to the jury a certified statement, by the clerk of the La Salle county circuit court, of a number of unsatisfied judgments against Lovell Kimball in that court, amounting in the whole to \$1,641.67; for the purpose of showing that they were liens upon the real estate upon which the insured buildings were erected, before the interest of Kimball in the premises was transferred to the Marseilles Manufacturing Company. This statement was also excluded from the jury, and an exception taken to the opinion of the court thereon.

The defendants then produced and offered to read in evidence to the jury a deed of assignment from the Marseilles Manufac-

turing Company to John C. Champlin, dated October 1st, 1842, for the benefit of the creditors of said company, for the purpose of proving the insolvency of said company, which, on motion, was also excluded from the jury, and an exception thereon taken to the opinion of the court by the defendants below.

The defendants below then called one Wakefield as a witness, who testified that he was the sawyer of the plaintiffs below, before and at the time of the loss, and worked for them from October 1841 until the mills were burned; that there was a room used in the mill as a counting-room, having a desk, and a stove where fire was made and kept in cold weather; that the carpenter's work which had been done for the repairs of the mill, in the mill, when there was no fire, was, while witness lived with and worked for said plaintiffs below, afterwards transferred into the counting-room, where the stove was; that the carpenter's work, besides repairs on the mill, was also done in this room; that a corner cupboard was made in it, and that there were chips and shavings on the floor; that in February, 1842, there was a furnace erected upon a stone pier which stood in the river; the furnace was built of brick, with a chimney coming through a shed roof about a foot and a half, which roof joined up to the wall. There was upon the furnace a box faced with iron next to the fire, made tight, and designed to steam shingle timber. Witness knew that fire was twice put into this furnace; that there was a plank-way from the furnace to the bank, to pass to and from the furnace, and that between the pier and the shore a part of the water of the river flowed under this plank-way; that this plank-way connected the furnace with the mill-yard, where there were chips, saw-dust, and other combustible substances; that on the Tuesday preceding the burning of the mills, a fire was communicated to the yard between the flouring and saw-mills, from the furnace or some other source, — but could not say whether from the furnace, or in bringing fire to it, — which would, had it not been extinguished by witness, have burnt up the mills; that this furnace increased the risk. Upon being cross-examined, the witness further testified that the work which had been done in the mill when there was no fire there, was afterwards done in the counting-room where the stove was; that he had known fire in the stove at the

time, and after carpenter's work was done in that room; but that the stove had been taken out of the room ten days or two weeks before the fire.

The defendants below then called one Winlock, who testified that before the insurance was made the carpenter's work was done in the mill; that afterwards it was done in the counting-room, where the stove described by Wakefield was; that before the insurance, there was nothing in the room where the stove was but a desk; knows of a corner cupboard made there; that the furnace had fire in it three or four times before the loss; that the furnace was connected with the shore and saw-mill by a plank-way under which the water flowed; that the chimney of the furnace passed through a shed roof about a foot and a half; that the roof was joined to the mill. Witness believed that the furnace increased the risk; cannot state whether the carpenter's work was done with the knowledge and consent of the owners of the mills or not, and that the last fire made in the furnace was at least two weeks before the mill was destroyed.

James H. Woodworth, being recalled, further testified that, in his opinion, the furnace did not increase the risk, but diminished it; that the furnace had not been used to steam shingle blocks; that it was built upon a pier, and that the water passed between it and the mill; though a furnace was a necessary appendage to the shingle machine; that when the insurance was made there was no furnace built; that an old steaming box not set was in the lower room of the mill; but that the furnace had been erected when the mills were burnt.

The plaintiffs below then read in evidence a release dated the 15th day of May, 1841, from Ebenezer Jackson, of Connecticut, to Lovell Kimball, of the mortgage heretofore mentioned, and the premises thereby conveyed. Here the testimony closed.

The defendants below then moved the court for the following instructions to the jury, to wit:—

1st. That if from the testimony the jury believe, that at the time of the execution and delivery of the policies sued upon the plaintiffs below had a less estate than the whole in lot No. 2, in the town of Marseilles, upon which the buildings insured were erected, and the same was not disclosed in the applications of the plaintiffs to the defendants for insurance, they must find for the defendants.

2d. That if the jury believe from the evidence, that at the time application was made by the plaintiffs for insurance, and the two policies sued upon were issued, the real estate upon which the buildings were erected was incumbered, either by judgment, mortgage, or otherwise, and such incumbrance was not specified, and set out in their applications for insurance, then the jury must find for the defendants.

3d. That if the jury believe from the evidence, that at the time the applications were made for insurance by the plaintiffs, as well as at the times the policies sued upon were issued, there was in the saw-mill a carpenter's shop, and the existence of the same was not made known to the defendants at the time of the making of the applications, and the obtaining the insurance by the concealment of that fact, the plaintiffs did not in fairness and good faith state all the material circumstances within their knowledge, which may affect the risk, they must find for the defendants.

4th. That if the jury believe from the evidence, that any alteration has been made in either of the buildings insured, by the proprietors thereof after the insurance had been made thereon, whereby said buildings were exposed to greater risk or hazard from fire than they were at the time they were insured, then the insurance made upon said buildings was void, unless an additional premium and deposit after such alteration had been settled with and paid to the directors, they must find for the defendants.

5th. If the jury believe from the evidence, that after the issuing of said policies any addition was made to the insured property which increased the risk, and no notice given to the insurers, such increased risk affects the validity of the policies.

6th. If the jury believe from the evidence, that the proprietors of the insured property removed their workshops from the flour-mill where there was no stove, to another part of the mill where there was a stove, and by so doing increased the risk, it will render the policy invalid.

7th. That the representations made by R. P. & J. H. Woodworth, as officers of the Marseilles Manufacturing Company, are part of the policy sued upon, and are a warranty as to the condition of the mill and property insured, and that any devia-

tion therefrom, either by not truly representing the state of the risk, or the business carried on which deviate from the representation, will avoid the policy.

8th. That when the officers of the Marseilles Manufacturing Company applied to be insured, and represented the state of the property and risk sought to be insured, they cannot by so doing never be the agents of the Mutual Insurance Company, but the agents of the plaintiffs.

The fifth and seventh instructions were given; the first second, and sixth refused: the fourth and eighth instructions refused as asked for, but given as follows: "That if the jury believe that the alterations mentioned in these instructions were actually made, materially increased the risk, and that no notice of such alterations was given to the defendants, it was a circumstance from which the jury may infer, in their discretion, that the plaintiffs had not acted fairly in the matter." The third instruction was given by inserting the words, "the jury may infer," in the seventh line thereof, next after the word "fact." To which refusal and alterations by the court the defendants excepted.

The jury returned a verdict in favor of the plaintiffs below, for \$10,000 damages. A motion was made by the defendants for a new trial, and overruled, and a judgment rendered upon the verdict, as before stated.

The following are assigned by the plaintiffs in error, as causes of error, to wit:—

1. The court erred in refusing the continuance prayed for.
2. In not requiring the plaintiffs below to give security for costs.
3. In admitting the evidence of Woodworth, notwithstanding his interest in the event of the suit.
4. In admitting the policies to be read to the jury.
5. In rejecting the evidence of title offered by the defendants below.
6. In rejecting the assignment from the Marseilles Manufacturing Company to John C. Champlin.
7. In admitting the release of the mortgage from Jackson to Kimball.
8. In refusing the instructions asked for by the defendants below.

9. And in giving the instructions as modified by the court.

In disposing of the principal matters in issue between the parties, we do not deem it necessary, either to notice all the objections which were raised by the plaintiffs in error, in the court below, or which have been assigned as causes of error in this court; but will confine our opinion to such of the questions only as appear to be necessary to a proper understanding of the cause, and a correct determination of the relative rights of the parties, upon the whole matter as submitted by the record.

The plaintiffs in error contend, in the first place, that the circuit court erred in refusing the continuance of the cause at the May term, 1843, for the reasons stated in the affidavit of Moses G. Atwood, the secretary of the company. This exception, we think, is well taken; as well on account of a substantial amendment of the declaration at that term, as for the want of sufficient time to procure testimony of witnesses deemed important at the trial. Two separate declarations had been filed in the suit; a motion was made to compel the plaintiffs below to elect upon which they would proceed; the plaintiffs thereupon obtained leave to amend; and the declaration on policy 763 was amended by incorporating with it the two counts of the declaration on policy 467, with suitable alterations to make it a declaration with four counts, embracing the contracts of the parties, and supposed liabilities of the defendants below, under the two policies. This we consider a substantial amendment of the declaration, and according to the authority of the case of *Covell v. Marks*, 1 Scam. 525, the defendants below were entitled to a continuance, without being required to show that they were surprised by the amendment. In that case, the amendment was made by adding to the description of the note sued upon the words, "with twelve per cent. interest from the date until paid;" and the court held, that the defendants, without showing further cause, were entitled to a continuance.

We are also of opinion, upon the other ground, that sufficient time was not allowed after the filing of the declaration, in so important a cause, to have enabled the defendants below either to have procured the personal attendance of True and Cook, two of the witnesses named in the affidavit, from La Salle

county, a distance of two hundred and twenty-five miles from the place of trial, by subpœna, or to have taken their depositions upon proper notice to the plaintiffs.

Under the plea of the general issue, and the notice under it, the defendants below had a right to avail themselves of any matter of defence arising from the illegality of the insurance, from a non-compliance with some express or implied warranty or condition, from the want of a proper interest, from misrepresentation or concealment, or from a performance on their own part of the terms of the policies. The defendants below stated in their affidavit for a continuance, that they expected to prove by these witnesses, "that after the issuing of the two policies of insurance, and a short time previous to the destruction of the insured buildings by fire, the plaintiffs below erected adjoining to one of the saw-mills insured, a steam furnace, by which the risk was greatly increased," &c. Such evidence was material and proper under the issue, it being a question for the consideration of the jury whether the addition, to one of the insured buildings, of a steam furnace, after the insurance was effected, increased the risk of the insurers or not. *Cary v. The Com. Ins. Co.* 10 Pick. 535. For these reasons, without going further into an examination of the arguments of counsel, and the authorities produced in this court at the hearing, we are of opinion that the circuit court erred in not sustaining the motion for a continuance.

The third cause assigned for error, and to which we will give a passing notice, questions the correctness of the decision of the circuit court in admitting the evidence of James H. Woodworth, on account of his supposed interest in the event of the suit: first, as a stockholder in the Marseilles Manufacturing Company; and secondly, as a creditor of that company. It appears from his testimony, that he had been a stockholder in the company, but had sold out his stock before the trial in the court below, and also that he was a creditor of the company. As to the first objection, the doctrine appears to be well settled, that a stockholder in a bank or insurance company may sell out his stock after the commencement of a suit, and will thereby become a competent witness. 1 Greenleaf's Ev. 437. In regard to the second objection, the question is, whether it shall go

to his competency or credibility. He stated in the course of his examination, that he had no interest in the event of the suit, except as a creditor of the plaintiffs below, but expected that his dividend would be increased, as such a creditor, by a recovery in this suit; that he believed the Marseilles Manufacturing Company would be able to pay all its debts, notwithstanding the plaintiffs below should fail in the suit; and, upon being recalled upon the stand, after the examination of Wakefield and Winlock, who were introduced as witnesses by the defendants below, in relation to the erection of a steam furnace adjoining to one of the saw-mills insured, he further testified, "that the furnace did not increase, but diminished the risk of the insurers."

A remote contingency, or the mere expectation of a benefit or payment, will not disqualify a witness. To render him incompetent, he must in the general have a legal interest in the event of the suit; and such interest should be certain, direct, and immediate; as otherwise it goes to his credibility, and not to his competency. A general creditor will not be competent, although he swears that he expects his prospects for the recovery of his debt will be increased by the recovery of a judgment in the particular suit. 1 Greenleaf's Ev. 437, in note; 6 Cowen, 622; 1 U. S. Dig. 416, § 212. To have rendered Woodworth incompetent, it should have been shown that the Marseilles Manufacturing Company was insolvent, and unable to pay its debts, if such was the fact. In that event, he would have been directly interested in increasing the funds of the company by a recovery of the amount insured by the two policies; inasmuch as his dividend as a creditor of the company would, upon such recovery, be increased in a corresponding proportion.

The rule in regard to the admissibility of persons as witnesses, who are supposed to be interested in the event of the suit, has been very much enlarged within a few years past, both in the courts of England and America; so that the general rule may now be stated to be, that the witness will be permitted to testify in all cases where he is not directly interested in the event of the suit; and to allow the objection to go to his credibility, rather than to his competency.

In this case, Woodworth having ceased to be a stockholder before the trial below, could not as a mere creditor expect any-

thing more than his debt and interest, if the company, according to his belief, would be able to pay its debt without a recovery in this suit. He would not depend upon such recovery for the payment of his demand, unless the company should, contrary to his expectation, turn out in the end to be insolvent; in which event he would be interested to the extent of his dividend. Upon the whole, we think his interest too remote, if he is to be believed, to have excluded him as a witness, and that the court below decided correctly in permitting his evidence to go to the jury.

In regard to the fourth assignment of error, it is only necessary to say, that under the twelfth section of the practice act, the two policies were properly allowed to be read in evidence to the jury without proof of their execution. That section provides, "that no person shall be permitted to deny, on trial, the execution of any instrument in writing, whether sealed or not, upon which any action may have been brought, unless the person denying the same shall verify his plea by affidavit," &c. Gale's Stat. 531, 532.

We will now pass over the remaining assignments of error, with the exception of the eighth, which we think presents the main question for revision in this court. It consists in the refusal of the court to give instructions to the jury, which were asked for by the defendants at the trial in the court below. The first instruction asked for by the defendants below, and which the court refused to give to the jury, is as follows: "That if the jury believe from the testimony, that at the time of the execution and delivery of the policies sued upon, the plaintiffs had a less estate than the whole in lot No. 2, in the town of Marseilles, upon which the buildings insured were erected, and the same was not disclosed in the application of the plaintiffs to the defendants for insurance, they must find for the defendants." This instruction, we think, should have been given. The 13th section of the "Act to incorporate the Illinois Mutual Fire Insurance Company," approved February 23d, 1839, is as follows: "Said company may make insurance for any term not exceeding ten years, and any policy of insurance, issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said com-

pany, in all cases where the assured has a title in fee simple unincumbered, to the building or buildings insured, and to the land covered by the same; but if the assured have a less estate therein, or if the premises, be incumbered, the policy shall be void, unless the true title of the assured, and the incumbrances on the premises, be expressed therein." Neither of the policies sued upon, or the applications or representations which, by the terms of the contracts, are made parts of the policies to which they refer, express that the title of the defendants in error to the land upon which the insured buildings were erected was less than an estate in fee simple, or that the same was incumbered; the inference, therefore, must be, that they had an unincumbered estate in fee simple, as otherwise the buildings would not be of an insurable character, and the policies, by the terms of the charter, void.

It is contended on the part of the defendants in error, that the applications and policies were filled up and executed according to the forms furnished by the agents of the plaintiffs in error, and that, consequently, they had no right to complain, and are bound by the contracts, as they appear upon the face of the policies. This doctrine is certainly correct, when applied ordinarily to joint stock marine and fire insurance companies, where the parties assured are not members of the company, but is not applicable to the Illinois Mutual Fire Insurance Company, where the insured as well as the insurers are, by virtue of the contract of insurance, and the conditions of the charter, alike members of the company.

The second section of the charter provides, "that all and every person and persons who shall at any time become interested in said company, by insuring therein, shall be deemed and taken to be members thereof, for and during the term specified in their respective policies, and no longer, and shall at all times be concluded and bound by the provisions of this act." Both the policies refer to the act incorporating the Mutual Fire Insurance Company, and the company promise, in case of loss or destruction by fire, to pay to the insured, "according to the provisions of the said act," the sums insured within three months after the said property shall be burnt, &c. Here the charter itself is made a part of the contract, and it will not do

to permit the defendants in error, who are also members of the company to plead ignorance of its provisions.

The plaintiffs below averred in their declaration that they had an interest in the property destroyed at the time of the execution of the policies, and from thence until the said loss by fire, to a large amount, &c. As to the averment of interest, it is said, that no particular description is necessary to be stated in the declaration, but that it must be apparent from the facts as averred that there is an interest. From an examination of numerous authorities, the result appears to be, that at common law, a policy of insurance is considered in the nature of a contract of indemnity, and though it were declared on without any direct averment of interest, yet the declaration upon its face would import an insurable interest, which must be proved by the plaintiffs at the trial. Sir James Mansfield, when chief justice of the court of common pleas, said: "It is incumbent on the plaintiffs to state in the first place in their declaration, and afterwards to make out in evidence a substantial interest; so that if the averment of interest should be stricken out there would be no foundation for the action." 2 Phillips on Insurance, 623, 624. The averment of interest in the property insured was therefore a material and substantial averment, and, in legal intendment, meant such an interest or ownership as was insurable under the charter of the company; and as a less estate than an unincumbered fee simple estate in the land upon which the insured buildings were erected was not set forth and described either in the applications or policies, according to the 13th section of the act of incorporation, a fee simple estate will be intended, as otherwise the policies would be void. By the 6th section of the charter it is provided that "insurances shall be made in all cases upon the representation of the assured, contained in his application therefor, which representation shall in fairness and good faith state all the material circumstances within his knowledge which may affect the risk." If the insured, therefore, at the time of the insurance, had a less estate than an unincumbered estate in fee simple in the premises, it was their duty to have disclosed the fact to the insurers, as otherwise, by the concealment of the true nature of their title, a fraud would be practised upon all the other members of

the company. We think, under the circumstances of this case, that the plaintiffs in error had a right to infer, that the defendants in error had a fee simple estate in the premises, and that in making and delivering the policies they were warranted in believing that their title was of that character. The omission by the defendants in error to state that they had a less estate than an unincumbered estate in fee simple, in the applications for insurance, so that their true interest in the premises might have been stated in the policies if otherwise, also amounted to a warranty that their title was such as was required by the charter, as otherwise the buildings upon which the insurance was requested would not have been of an insurable character. This warranty operated as a condition precedent to the assured's right of recovery, and they cannot recover on the policies, without averring and proving that such condition has been complied with.

In the case of *Stetson v. The Massachusetts Mutual Fire Ins. Co.* 4 Mass. 337, Sewall, Justice, lays down the law thus: "The estimate of the risk undertaken by an insurer in a policy against loss by fire, must generally depend upon the description of it made by the assured or his agent. A mistake or omission in his representation of the risk, whether wilful or accidental, if material to the risk insured, avoids the contract; and a warranty being in the nature of a condition precedent, must be fulfilled by the insured, before performance can be enforced against the insurer; and whether the thing warranted was material or not; whether the breach of it proceeded from fraud, negligence, misrepresentation, or any other cause, the consequence is the same." *Columbian Ins. Co. v. Lawrence*, 10 Peters, 515; Marshall on Insurance, 335, 339, 347; *Alston v. The Mechanics' Mutual Fire Ins. Co.* 4 Hill's (N. Y.) R. 334; *Fowler v. The Aetna Fire Ins. Co.* 6 Cowen, 676. So that it appears to be well settled, that, in an action on a policy of insurance against fire, the plaintiff on the trial must prove that he had an insurable interest in the premises before he can recover. *Gilbert v. The N. A. Fire Ins. Co.* 23 Wend. 43; *Chandler v. Rossiter*, 10 Ib. 488; *Columbia Ins. Co. v. Lawrence*, 2 Peters, 25.

Did the plaintiffs prove such an interest in the lot upon which the insured buildings were erected, at the trial in the court be-

low? The only evidence upon that subject was the parol statement of James H. Woodworth, "that the defendants in error were the owners of the property insured." It is said in 2 Phillips on Ins. 735, 746, that "in regard to a ship or other personal property, possession and other acts of ownership are evidence of interest;" but we have not been able to find any authority in cases of insurance against fire, where the same doctrine has been applied to an interest in land. But admitting that possession in this case could properly be considered as *prima facie* evidence of a fee simple estate in the premises, so as to throw the *onus probandi* upon the plaintiffs in error, has such possession been proved by any of the witnesses to have been in the defendants in error? We think not. Where the possession of land alone is relied upon for any legal purpose, in the absence of paper title, it should, in the language of the law, be a *pedis possessio*, an actual occupancy of the premises in question. *Webb v. Sturtevant*, 1 Scam. 181. The witness, Woodworth, says that they were the owners of the property insured, meaning thereby that they were the owners of the buildings and improvements which were insured, and not the land covered by them. The term "owner" or "ownership," as applied to land, according to the authority of the case of *Wright v. Bennett*, 3 Scam. 258, means a fee simple estate, and the plaintiff in that case was required to prove such an estate in the lands trespassed upon, before he could entitle himself to a verdict.

Titles to real estate in this state, emanating as they do in all cases in the first instance from the United States by grant or patent, are susceptible of easy proof, and it is imposing no hardship upon the defendants in error to require such proof at their hands, rather than to impose the negative burden upon the plaintiffs in error of showing title out of them. They are supposed to be best acquainted with their own title; they have possession and control of the written evidence to sustain it, and it is but right that they should be required to establish it by the best proof the nature of the case is susceptible of. It is also proper that the defendants in error should show themselves possessed of a fee simple estate in the premises, for another reason. By the 9th section of the charter it is provided that "every member of said company shall be and he is hereby bound to

pay his proportion of all losses and expenses happening or accruing in and to said company; and all buildings insured by and with said company, together with the right, title, and interest of the assured to the lands on which they stand, shall be pledged to said company; and the said company shall have a lien thereon against the assured, during the continuance of his, her, or their policies." As every member is bound to pay his due proportion of all losses and expenses which may happen to the company, they should in all cases act fairly and honestly towards each other, as otherwise the contributions would be in unequal and unjust proportions. If the estate of the insured be less than a title in fee simple, they should disclose that fact and cause its true nature to be inserted in the policy; if it be a fee simple estate, they should not consider it a hardship to be required to prove it. The representation ought always to be fair, and omit nothing which is material for the insurers to know, as the extent of the assured's interest in the real estate is always considered by the insurers, in taking or rejecting the risk and in estimating the premium; and affords them an opportunity of judging how far the insured may be engaged or interested in guarding the property insured against loss, or may be induced to be careless in order to convert their interest into money.

Upon the whole, we are of opinion that the judgment of the court below should be reversed, and the cause remanded for the purpose of affording the defendants in error an opportunity of proving to the jury such a title to the land as, according to the 13th section of the charter, would make the buildings which were upon it of an insurable character; and to the plaintiffs in error to rebut such proof, by showing either an absence of such title, that it is defective, or that the estate was incumbered by such mortgages or liens as, by the provisions of the charter, would defeat the action.

Judgment reversed with costs, and the cause remanded to the court below for further proceedings not inconsistent with this opinion.

Judgment reversed.

Evidence. — Arson. — Assignment.

THE PEOPLE vs. BEIGLER.¹

(Supreme Court, New York, 1844.)

Evidence. — Arson. — Assignment.

The production by a corporate body of its act of incorporation, and proof of user under it, afford presumptive evidence of a full compliance with all the prerequisites of the statute essential to give operation and effect to its several provisions and conditions.

Where it appeared on the trial of a prisoner for arson in setting fire to his own dwelling, for the purpose of charging an insurance company with the loss, that the prisoner immediately after the fire consulted with and employed a lawyer to draw up the necessary papers for obtaining the insurance money, that he then stated his loss, that a notice was spoken of, and that the notice of loss served on the company the day after the fire, with the name of the prisoner subscribed, was in the lawyer's handwriting; *held*, that this evidence of the employment of the lawyer to give the notice of loss was sufficient to warrant the judge in admitting the notice, and submitting to the jury the question of the lawyer's authority to give such notice.

The policy of insurance contained the usual clause vacating the policy in case of assignment of it without insurers' consent. *Held*, that a general assignment by the insured of all personal property to pay creditors did not render the policy void; the clause having reference to the policy and not to the property insured.

THE prisoner was indicted at the Monroe general sessions for the crime of arson in setting fire to his own dwelling, for the purpose of charging the insurance company with the loss. The policy covered an insurance of household furniture and the personal property in the dwelling to the amount of \$6,000.

After an argument and issue in the sessions, the court by an order entered in their minutes sent the indictment to the court of oyer and terminer for trial, and which was afterwards brought into the supreme court by *certiorari*, and the *venire* changed to the county of Genesee, where it was tried at the circuit in February, 1844, and the prisoner convicted of arson in the third degree.

In the course of the trial the counsel for the people introduced an act of the legislature of the state of Pennsylvania, passed April 15th, 1835, incorporating an insurance company, called "The Spring Garden Fire Insurance Company of the County of Philadelphia."

The agent of the company at Rochester proved that he had been an agent there some eight years; and had issued a great number of policies during that time, which had been previously

¹ Hill & D. 133.

signed by the president and secretary; that the company had paid various losses that had occurred on policies thus issued by the witness by countersigning them as agent. That he had received some four or five hundred letters from the secretary on the business of the company during the period mentioned.

The counsel for the prisoner objected to the admission of the act of incorporation, on the ground that the conditions of the second section requiring the commissioners therein named, or a majority of them, to certify certain things to the governor, had not been proved. The objection was overruled, and the act of incorporation admitted.

The counsel for the people then offered in evidence the original policy of insurance issued to the prisoner May 9, 1843, signed by the president and secretary and countersigned by the agent, which was objected to for the reason assigned above against the admission of the act of incorporation, but this was also overruled, and the policy admitted.

It appeared further in evidence, that the prisoner immediately after the happening of the fire called upon Judge Chapin and urged him to make out the papers for the purpose of obtaining the insurance money under the policy, saying that his loss was about \$2,600. That a notice was spoken of. The prisoner came into the office several times in the course of the day and consulted Judge Chapin on the subject.

A notice to the company of the loss, dated the 2d of November (the fire having occurred on the evening of the 1st), with the name of the prisoner subscribed, all in the handwriting of Judge Chapin, and which had been sent to the district attorney by the agent, was then produced; it was objected to on the ground that proof of the authority of Judge Chapin was insufficient, but the objection was overruled, and the paper admitted.

It was proved, in the course of the trial, that the prisoner had made a general assignment of all his personal property to one C. Frost and C. S. McKnight in trust to pay his debts, returning to him the overplus, if any remained after payment of said debts, which was dated 21st June, 1843. This, it was urged by the prisoner, rendered void the policy, which was overruled.

The above statement contains all the facts brought out in

the progress of the trial, upon which any question of law had been raised and decided by the circuit judge, and which are brought before this court for review.

By the Court, NELSON, C. J. 1. By the second section of the act incorporating the Spring Garden Insurance Company it is provided, that when the whole number of shares in the capital stock shall have been subscribed, the commissioners shall certify to the governor the names of the subscribers respectively, and the governor shall thereupon issue letters patent, &c., erecting said subscribers into a body politic and corporate, &c.

The objection to the admission of the act of incorporation, and also of the policy of insurance, made upon the trial, was that the condition contained in this section, requiring the commissioners to certify as above to the governor, had not been proved; and hence no legal evidence of the incorporation of the company, and, therefore, no existing body that could be defrauded by reason of the prisoner setting fire to the subject insured.

The answer is, that according to a series of cases heretofore decided in this court, the production of the act of incorporation, and proof of user under it by the corporate body, afford presumptive proof in the first instance of the fact of incorporation; in other words, of a full compliance with all the prerequisites of the statute essential to give operation and effect to its several provisions and conditions. *Wood v. The Jefferson County Bank*, 9 Cow. 194; *Fire Department of N. Y. v. Kip*, 10 Wend. 266, per Savage Ch. J.; *Utica Ins. Co. v. Cadwell*, 3 Id. 296; *Bank of Michigan v. Williams*, 5 Id. 478; *S. C. in error*, 7 Id. 539.

This is also the rule of evidence adopted in other states upon the same subject. *Grays v. Turnpike Co.* 4 Rand. R. 578; *Hagerstown Turnpike Road Co. v. Creeger*, 5 Harr. & Johns. 122; *Angel & Ames*, 380.

2. The evidence in the case of the employment of Judge Chapin to give the preliminary notice to the company of the loss was, undoubtedly, sufficient to warrant the court in admitting the written notice offered, and submitting the question to

the authority of the jury. The proof, indeed, was quite full and satisfactory on the point, and fully justified the finding.

3. The following clause is found in the policy, namely: "The interest of the assured in this policy is not assignable unless by consent of this corporation, manifested in writing; and, in case of any transfer or termination of the assured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." A similar clause will also be found in one of the conditions. The provision refers, exclusively, to an assignment or transfer of the policy itself, and not of the subject matter or property insured. *Smith v. Saratoga Mutual Fire Ins. Co.* 1 Hill, 497; ¹ *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 81; *S. C.* 5 Id. 76; 1 Phillips on Ins. ch. 1, § 7, p. 34, ed. 1840.

Nor does this assignment of the property insured carry along with it the policy as an incident thereto. 1 Phillips, 38, and cases.

We have looked attentively into the affidavits for and against the motion for a new trial, founded upon the alleged irregularities of the jury, and are perfectly satisfied that they afford no ground that will justify our interference.

The charge that the jury indulged in the use of ardent spirits in the course of the trial is completely rebutted, and the two cases of the absence of jurors satisfactorily explained. In a word, all the imputations attempted with so much apparent industry to be fixed upon the conduct of the jurors, severally, throughout the trial, are satisfactorily explained and refuted. Most of them turn out, on investigation, to be altogether unfounded in fact, whilst other acts, of themselves of the most innocent and harmless character, are perverted and magnified in a most extraordinary, if not unwarrantable manner. I regret to see that some of the constables attending upon the jury have allowed themselves to be improperly used upon the occasion of getting up some of these unfounded and fabricated charges. One of them, at least, has undertaken to give detached parts of the consultations of the jury after they had retired to deliberate on their verdict, and which turn out to have been altogether a misapprehension on his part.

¹ *Ante*, p. 97.

Insurance on Buildings and Personal Property, etc.

Some of the deponents have made affidavits on both sides, and taken back and explained away pretty much all the material matters stated in the first instance on behalf of the motion.

We are all of opinion that there is no ground, either in the law of the case, or arising out of the motion founded upon alleged irregularities of the jury, for a new trial.

New trial denied.

TRENCH & another vs. THE CHENANGO COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1845.)

Insurance on Buildings and Personal Property. — Distance of Buildings. — Omission to state.

In an action on a policy of insurance covering — in \$750 each — a mill and machinery, it appeared that there was a provision requiring the assured to state the location of the property and its relative situation to other buildings, and its distance from them if less than ten rods; also all incumbrances, and the estate, if less than a fee of the assured. *Held*, that an omission to state the distance of a building within ten rods avoided only the insurance upon the mill, and did not avoid that on the machinery.

ASSUMPSIT on a policy of insurance, tried before Gridley, circuit judge, at the Oneida circuit, in September, 1843. On the 5th of January, 1842, the defendants insured J. & T. Trench, the plaintiffs, against loss or damage by fire, “\$750 on their undivided half of machinery therein, and \$750 on their undivided half of stock therein; *reference being had to the application of said J. & T. Trench for a more particular description, and the conditions annexed, as forming part of this policy,*” &c. Annexed to the policy was a printed statement commencing thus, “Conditions of insurance,” which contained the following, among other clauses: “All applications for insurance must be made in writing, according to the printed forms prepared by the company. Such application shall contain the place where the property is situated; of what materials it is composed; its dimensions, number of chimneys, fireplaces, and stoves; how

¹ 7 Hill, 122.

constructed, and for what occupied; *its relative situation as to other buildings; distance from each, if less than ten rods; for what purpose occupied; and whether the property is incumbered; by what and to what amount; and if the applicant has a less estate than in fee, the nature of the estate.*" The application for insurance contained a description of three buildings as standing within the distance of ten rods from the paper-mill insured, but two others, viz., a plough-shop and dwelling-house, also standing within the ten rods, were not mentioned. On the 23d of February, 1842, the property insured was accidentally destroyed by fire, and this action was brought to recover for the loss thus sustained. The defendants moved for a nonsuit on the ground that the plaintiffs had not mentioned in their application all the buildings standing within ten rods of the one insured, but had omitted the plough-shop and dwelling-house. The circuit judge granted a nonsuit, and the plaintiffs now moved for a new trial on a bill of exceptions.

J. A. Spencer, for the plaintiffs.

D. Wright, for the defendants.

By the Court, BEARDSLEY, J. At the close of the testimony the counsel for the defendants objected that the plaintiffs could not recover, on the ground that, when the application for insurance was made and the policy executed, a dwelling-house and plough-shop stood within less than ten rods of the paper-mill, and were not described or referred to in the application. The objection was sustained by the circuit judge, and the plaintiffs were nonsuited.

The property insured is mentioned in the policy as an undivided half of a paper-mill, and the machinery and stock therein; and then follows this clause, "reference being had to the application of said J. & T. Trench for a more particular description, and the conditions annexed as forming a part of this policy." The conditions are thus undoubtedly made a part of the contract of insurance, as much so as if embodied in the policy. *Burrett v. The Saratoga County Mutual Ins. Co.* 5 Hill, 188. But it is otherwise with the application. That, as it seems to me, is referred to for the mere purpose of describing and identifying the property insured, and not to incorporate its statements into the policy as parts thereof. The material question in the

present case, however, would not, in my judgment, be changed if the application could be regarded as a part of the contract of insurance.

One of the conditions thus inserted in the policy is in these words: "All applications for insurance must be made in writing, according to the printed forms prepared by the company. Such application shall contain the place where the property is situated; of what materials it is composed; its dimensions, number of chimneys, fireplaces, and stoves; how constructed, and for what occupied; its relative situation as to other buildings; distance from each, if less than ten rods; for what purpose occupied; and whether the property is incumbered; by what and to what amount; and if the applicant has a less estate than in fee, the nature of the estate."

This condition constitutes part of the contract of insurance, and amounts to an express warranty by the assured that his application truly describes or indicates all the buildings within less than ten rods from the paper-mill. In *De Hahn v. Hartley*, 1 T. R. 343, Lord Mansfield said: "A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced, but being inserted, the contract does not exist unless it be literally complied with." "The very meaning of a warranty," observed Ashhurst, J., in the same case, "is to preclude all questions whether it has been *substantially* complied with; it must be *literally* so." "In a case of warranty it is perfectly immaterial whether the misdescription is the result of fraud or mistake; it is a condition precedent, and no excuse can be received for the non-performance of it." Per Sutherland, J., in *Fowler v. The Aetna Fire Ins. Co.* 7 Wend. 270; and see *Snyder v. The Farmers' Ins. & Loan Co.* 13 Id. 92; *S. C.* 16 Id. 481; *Alston v. The Mechanics' Mutual Ins. Co.* 4 Hill, 329; Ellis on Ins. 28.

The application in this case describes some of the buildings standing within ten rods of the property insured, but omits all mention of the plough-shop and dwelling-house. Here, then, is a violation of warranty on the part of the plaintiffs, and, so far as respects the paper-mill and the machinery, if that should be regarded as part of the realty, I see no ground on which the defendants can be made liable.

Act of Incorporation. — Limitation. — Intention.

But this company may insure personal property as well as buildings (Laws of 1836, p. 314, § 1), and the present policy is upon both descriptions of property. The machinery insured may be so attached to the building as to be deemed a part thereof, although there is nothing in this case to show how that was; but the stock was unquestionably personal property. Now, although the policy may be void as an insurance on the paper-mill, including the machinery, if that was part of the mill, it still may be valid as to the personal property. The condition relied on by the defendants refers exclusively to the applications for insurance upon buildings. It requires the applicant to state where the property is situated; its materials, dimensions, construction, chimneys, fireplaces, and stoves; its distance from other buildings, and the purpose for which it is occupied. All this is sensible and intelligible when understood in reference to buildings, but would be absurd and unintelligible when applied to personal property.

The attention of the circuit judge does not appear to have been called to the fact that this policy was upon personal property as well as upon a building. Had it been, I apprehend he would not have nonsuited the plaintiffs for the breach of a condition, which can have no possible reference to anything but the insurance on the building. As to that, I agree that the objection was fatal, but the plaintiffs were, notwithstanding, entitled to recover the value of the personal property insured.

The nonsuit should be set aside, and a new trial ordered.

Rule accordingly.

ALVIN DUTTON vs. THE VERMONT MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Vermont, February Term, 1845.)

Act of Incorporation. — Limitation. — Intention.

The seventh section of the act of the legislature incorporating the Vermont Mutual Fire Insurance Company, by which a time is limited for commencing actions against the company for losses by fire, applies to a case, where the directors, after examining a claim for loss, wholly disallow the claim; and the operation of this section, in this

¹ 17 Vt. 369.

Act of Incorporation. — Limitation. — Intention.

respect, is not affected by the statute of November 18, 1839, which specifies the time for payment for such losses.

Therefore, where a member of the company, residing in Windsor county, suffered a loss by fire, and duly notified the company thereof, and the directors, after making an examination of his claim, wholly disavowed the same, and notified him of their determination in January, and more than sixty days before the next term of the county court in either Washington or Windsor county, and he neglected to commence his action against the company for his loss at the next term of either of the said courts, it was held that his right of action was barred by the seventh section of the act of incorporation, notwithstanding he was not, by the act of November 18, 1839, entitled to demand payment of said claim until a time subsequent to each of said terms.

In the construction of a statute regard must be had to the intention of the makers of it; and this intention, many times, is to be ascertained from the occasion or necessity of making the statute.

ASSUMPSIT upon a policy of insurance, dated April 1, 1840, by which the defendants insured the plaintiff against loss by fire, to the amount of eleven hundred dollars, upon certain property specified; and the plaintiff alleged that a portion of the property insured had been destroyed by fire. The writ bore date March 31, 1842.

The defendants pleaded in bar, setting forth the seventh section of their act of incorporation,¹ and averring that the damage by fire to the plaintiff, mentioned in his declaration, happened on the 3d day of August, 1840, at Hartland, in the county of Windsor, and that on the 6th day of August, 1840,

¹ By which it is enacted, "That, in case of any loss or damage by fire happening to any members upon property insured in and with said company, the said member shall give notice thereof in writing to the directors, or some one of them, or to the secretary of said company, within thirty days from the time such loss, or damage, may have happened, and the directors, upon a view of the same, or in any such other way as they may deem proper, shall ascertain and determine the amount of said loss, or damage; and if the party suffering is not satisfied with the determination of the directors, the question may be submitted to referees, or the said party may bring an action against said company for loss, or damage, at the next court to be holden in and for the county of Washington, or in the county in which said party may reside, or in which said loss, or damage, by fire may

have happened, and not afterwards, unless said court shall be holden within sixty days after said determination, but if holden within that time, then at the next court holden in said county thereafter; and if, upon trial of said action, a greater sum shall be recovered than the amount determined upon by the directors, the party suffering shall have judgment therefor against said company, with interest thereon from the time said loss, or damage, happened, and costs of suit; but if no more shall be recovered than the amount aforesaid, the said party shall become nonsuit, and the said company shall recover their costs. *Provided*, however, that the judgment last mentioned shall in no wise affect the claims of said suffering party to the amount of the loss, or damage, as determined by the directors aforesaid."

the plaintiff duly notified the defendants of his loss, and claimed that they should settle and adjust the same, and pay him the amount thereof, according to the provisions of the policy, and that such farther proceedings were had, that afterwards, on the 6th day of January, 1841, the defendants, by their directors, rejected and disallowed the plaintiff's claim, and refused to pay him anything on account thereof, and that the plaintiff had notice of said disallowance on the 9th day of January, 1841, at Hartland, where he resided, which was more than sixty days before the then next term of the Washington county court, which was holden in April, 1841, and more than sixty days before the then next term of the Windsor county court, holden in May, 1841, to one of which said terms of said courts this action should have been brought, according to the provisions of said seventh section of the act of incorporation. To this plea the plaintiff demurred.

The county court rendered judgment that the plea was sufficient; to which decision the plaintiff excepted.

Tracy & Converse, for plaintiff. I. Was the plaintiff bound to commence his suit either at the April term of Washington county court, or the May term of Windsor county court, 1841, considered with reference merely to the provisions of the original act of incorporation? This question is to be determined by a construction of the seventh section of said act.

1. This section should receive a strict construction. It is in the nature of a penal law. It is in derogation of the right of suitors in general. It is not to be regarded as a statute of limitations, in the common and ordinary acceptation of the term.

2. But give to the section the most liberal construction that any rule of interpretation will admit, and it does not embrace this case, as we insist. "If the party suffering is not satisfied with the determination of the directors," &c. What determination is here meant? Most obviously it is the determination referred to in the next preceding sentence: "And the directors, upon a view of the same, or in such other way as they may deem proper, shall *ascertain* and *determine* the *amount* of said *loss or damage*," &c. These two sentences must be construed together, and the "determination" must be a "*determination* of

the amount of the loss or damage," and not a "*determination*" rejecting altogether all claim for loss or damage. The two are decidedly different things. In order to render it obligatory upon the claimant to commence his suit at the "next term of the court," &c., the directors must first ascertain *and determine the amount of loss or damage*," and the suffering party must be dissatisfied with such ascertainment and determination of the "amount of the loss or damage." But in this case the directors refused to ascertain and *determine the amount of the loss*. They did not even determine that there was *no "loss."* They simply rejected and disallowed the claim for the *loss*, and refused either to ascertain the amount of the loss, or pay anything therefor, or do anything whatever in relation to it. Such being the fact, we insist that the plaintiff had the same right enjoyed by other persons in bringing suits for breaches of contracts, and could bring his suit for the breach of the contract of insurance at any time within six years after the right of action accrued.

3. The proviso to the same section shows very satisfactorily, as we conceive, that the above view of the subject is the correct one: "Provided, however, that the judgment last mentioned shall in no wise affect the claim of said suffering party to the *amount of loss or damage, as determined by the directors aforesaid.*"

II. But, providing we are altogether wrong in our construction of this section, and that the construction contended for by the defendants is correct, we contend that the particular provisions of that section, as construed by the defendants, have been virtually superseded and repealed by the act of November 18, 1839.¹ By the latter act the defendants did not become liable to pay the plaintiff his loss till the 1st of December, 1841,

¹ By which it is enacted, "That all losses, which shall happen on policies issued by said company after the 1st day of January, A. D. 1840, and which shall be ascertained and adjusted on or before the first Wednesday in August, in any year thereafter, shall be paid by said company on the 1st day of December then next following; and all losses which shall be ascertained and adjusted between the said first Wednesday in August and the

1st day of December, in any year, shall be paid by said company on the 1st day of November next following the 1st day of December. And the insured shall be entitled to an order for the amount of such loss, drawn by the secretary, and accepted by the treasurer of said company, at the end of three months from the time of notice of said loss to said company, which order shall be on interest."

the directors having made their "determination" in the matter the 6th of January, 1841, according to the view of the defendants. No suit could therefore be sustained against the defendants, for the loss, until after two terms of the court both in Washington and Windsor counties had intervened.

But it will be said that the plaintiff was entitled to an order on the treasurer for the amount of his loss before the next session of the court in either of the said counties, and, being refused such order, he might have brought his suit for such refusal. Providing he could have sustained a suit at all (which we regard as by no means clear until after the money had become due and payable), he could, at most, have recovered but nominal damages. He must, therefore, have brought a second suit for the recovery of the amount of the loss, after the same had become due. It must be an extraordinary exposition of those statutes, which could require the prosecution of an unnecessary, if not an absolutely groundless and unsustainable suit, merely to save the right of action for the main matter in controversy.

L. B. Peck, for defendants. 1. By the section of the act of incorporation, recited in the plea, it is apparent that the plaintiff comes too late with his action. His claim was rejected by the company on the 6th day of January, 1841, of which he was notified on the 9th of the same month. The court at that time sat in Washington county, on the second Tuesday of April, and in Windsor county the last Tuesday of May, and to one of those terms the action should have been commenced, as it was more than sixty days from the 9th of January, to either of these terms. The determination mentioned in the seventh section is the allowance or rejection of the claim for damages. The time within which losses are to be paid does not affect the question. The plaintiff did not resort to his action until May, 1842, and he must abide the consequences of his own neglect.

2. The declaration is bad in substance.

The opinion of the court was delivered by

BENNETT, J. The seventh section of the act to incorporate the Vermont Mutual Fire Insurance Company provides, that in case of any loss or damage upon property insured, the person, whose property was insured shall give notice of the loss, or damage, in writing, within thirty days from the time when it

occurred; and the statute then empowers the directors, upon a view of the same, or in such other way as they may deem proper, to ascertain and determine the amount of the loss, or damage; and if the party insured is not satisfied with the determination of the directors, the question may be submitted to referees, or he may bring his action within a given time, specified in the act, and not afterwards.

No question can be made but what this action is barred, provided the case itself is one within this section of the statute. It is said, in argument, that, as the directors entirely rejected and disallowed the plaintiff's claim, and refused to pay him anything for his supposed damages, the case is not within the provisions of the special act, but should be governed by the general statute of limitations. In the construction of a statute we must always have regard to the intention of the makers of it; and this intention, many times, is to be collected from the occasion or necessity of making the statute, or some particular provisions in it. When the intention is once discovered, it should, with reason, be followed in giving effect to the statute, even though such construction seem somewhat opposed to the letter of the statute. The reasons why all claims for loss or damage against the Mutual Insurance Company should be adjusted as speedily as is consistent are quite obvious. All the individuals, who become interested in the company by insuring therein, become members thereof during the terms of their respective policies, but no longer. It is impossible for the directors to settle and determine the several sums to be paid by the several members of the company, as their respective proportions of the losses, until they have been liquidated in some one of the ways pointed out in the seventh section of the act. Every reason which would require a final adjustment, as speedily as possible, of any claim, for loss or damage, would apply with equal force, whether the claim was entirely rejected by the directors, or only in part; and though the statute speaks of the directors ascertaining the amount of the loss or damage, and the dissatisfaction of the suffering party with their determination, yet it is no forced construction of language to apply the provisions of the act to cases where the directors reject the entire claim, whether for one cause or another. To hold that this should make a dif-

Condition Precedent. — Prior Insurance. — Law of Salvage.

ference in the time allowed for bringing the action would be absurd in its consequences, and an irrational construction of the statute.

It is claimed by the plaintiff's counsel, that the seventh section of the act of incorporation, at least so far as the bar is concerned, is superseded and virtually repealed by the act of November 18, 1839. But we think not. That statute only provides in regard to the time when the company shall pay for losses which have been ascertained and adjusted. If, on policies issued after the 1st of January, 1840, the losses shall be ascertained and adjusted on or before the first Wednesday in August, in any year thereafter, the losses shall be paid on the 1st day of December following; and if ascertained and adjusted between the first Wednesday of August and the 1st day of December, in any year, such losses shall be paid on the 1st day of November next following. It is difficult to see how this statute is opposed to the seventh section of the original act of incorporation, relative to the time when claims shall be barred.

As we think the plea in bar is sufficient for a good declaration, there is no occasion to examine the objections raised in argument to the present declaration.

The judgment of the county court is affirmed.

JOHN LISCOM *et al.* vs. THE BOSTON FIRE INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1845.)

Condition Precedent. — Prior Insurance. — Law of Salvage.

A fire insurance policy provided that "all policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." *Held*, that though this was a condition precedent, it was complied with by the following memorandum written on the policy: "Five thousand dollars insured by the W. Ins. Co." And this too though but \$4,700 of the amount was in fact insured upon the building covered by the present policy, the balance being upon a barn adjacent.

The law of marine insurance, respecting salvage, does not apply to insurance against fire.

¹ 9 Met. 205.

THE case is sufficiently stated in the opinion of the court.

C. P. Curtis, for the plaintiffs.

Washburn, for the defendants.

HUBBARD, J. The principal question in the present case is, whether the defendants are discharged from their contract, by reason of a false description given to them for the prior policy procured by the plaintiffs at Worcester.

By the 16th article of the defendants' by-laws it is provided that all policies, which may issue from this company, to cover property previously insured, shall be void unless such previous insurance be expressed in the policy at the time it issued. The entry on the margin of the contract now in suit, which we consider of the like effect as if written in the body of the policy, is in these words: "Five thousand dollars insured by the Worcester Mutual Insurance Company." And by the evidence it appears that the sum of \$4,700 was insured on the building, and \$300 on a barn on the premises; and that the policy on the building included also a wooden end which was not covered by the defendants' policy.

It is contended that a compliance with the by-laws above mentioned is a condition precedent to a recovery, in cases where it appears; and we incline to the opinion. By the terms of the by-laws, the contract is void if the previous insurance is not expressed in the policy at the time it issues. This is not like a representation, on the effecting of a marine policy, which is not required to be made a part of the executed contract; but it is a condition upon which the contract rests, and consequently its insertion in the contract is necessary to give it validity. The great object of the provision is to guard against fraud by preventing insurance on property greatly above its value. The legislature were sensible of this exposure, on the part of insurers, to suffer by means of fraudulent losses, and they therefore prescribed, among other regulations for the government of fire insurance companies, Rev. Sts. c. 37, § 28, that they might insure upon any building within the state, any amount not exceeding three fourths of the value thereof. The object of the by-laws above recited is to give efficiency to this provision of the statute, by securing a timely notice of the extent of a previous insurance, if any, and thus to prevent the assuming of risks on the property, beyond three fourths of its value.

The defendants contend that the provision of this by-law has not been complied with, and that the present policy is therefore not binding on the defendants, by reason of the false description of the prior policy. This object we have carefully considered. The by-law does not prescribe the terms of such notice, nor how much of the previous contract should be inserted. A literal recital of the terms of the prior contract is not required, but such a notice of the nature and amount of the insurance, as will give the necessary information to the party from whom a subsequent insurance is sought.

In this case the plaintiffs named a larger sum than was actually underwritten on the main or brick building; but the defendants were not deceived by the representation nor induced to assume a greater risk than they otherwise would have done. This is obvious from the fact of their not insuring more than three fourths of the value of the building, upon the estimate of the plaintiffs, acted upon by them after the building had been examined by their agent, in reference to the taking of this risk.

If the insurance had been represented as less than the fact, the defendants might have been induced to underwrite a larger sum than they otherwise would have done, and thus might have been injured by the misstatement; but not so where it was overstated.

The notice expressed in the policy, we think, was a substantial compliance with the requirements of the 16th article of the defendants' by-laws, and a sufficient exposition of the fact of the former insurance, so as to give the defendants all the information material to be known in relation to the risk which they were requested to assume.

A question was also raised by the plaintiffs in regard to the direction given to the jury as to the amount of the loss; and in this respect we think the direction was erroneous. The law of marine insurance respecting salvage does not apply to the fire policies of mutual insurance companies. They assume the risk of only a certain part of the property, not usually, if ever, exceeding two thirds or three fourths of its value. In the event of loss, therefore, the contract being one of indemnity, the party is entitled to recover to the amount of that loss, if less than the

Negligence. — Fraud. — Agent. — Evidence. — Damages.

sum insured; and if there is a total destruction of the property, then to the amount of the policy.

According to the agreement of the parties, the verdict is to be amended, and judgment rendered for a total loss.

**JAMES F. HENDERSON & others vs. THE WESTERN MARINE
AND FIRE INSURANCE COMPANY.¹**

(Supreme Court, Louisiana, March Term, 1845.)

Negligence. — Fraud. — Agent. — Evidence. — Damages.

In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. But the negligence must be unaffected by any fraud or design on the part of the insured.

In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act.

Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence.

When an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he effected it, and not as proof of perjury. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony.

Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have consented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured.

APPEAL from the parish court of New Orleans, Maurian, J. Durant, for the plaintiffs.

Maybin & Roselius, for the appellants.

MORPHY, J. The petitioners, a commercial firm, located in the town of Bayou Sara, in the parish of West Feliciana, seek to recover \$551.07, which they allege to be the loss they have sustained on a lot of merchandise, insured against fire by the defendants, on the application of Morton Hoffman, their agent

¹ 10 Robinson, 164.

in New Orleans, and which was injured by fire during the term of the policy, in a store in Tchoupitoulas Street. They aver that the value of the goods, before the fire, was \$971.25; that, after being damaged, they were sold at auction by the order, and with the consent of, the underwriters, and produced \$420.18, thus making their loss amount to the sum claimed. The defendants admit the execution of the policy, but deny that the goods were sold by their order, or with their consent, or that the petitioners have complied with the conditions imposed upon them expressly by the policy, or by law. They further say, that the fire was caused by the design, or by the negligence, or fault of Morton Hoffman, the person named in the policy, and who effected the insurance; or by the design, or negligence, or fault of some one in the employ of Hoffman, with the view, on the part of said Hoffman, or said other person, to defraud the company, and for whose acts the petitioners are responsible. They further charge that, with the same fraudulent view, Hoffman claimed of them a loss exceeding the amount now sued for, in consequence of all which the policy has been forfeited; that the said Hoffman is the real plaintiff in the case, or that the petitioners are responsible for all his acts, &c. The case was tried before a jury, who gave their verdict in favor of the plaintiffs. From the judgment entered up thereon the defendants have appealed, after vainly attempting to obtain a new trial.

Our attention has been drawn to several bills of exception spread upon the record. The first is to the opinion of the judge below, refusing to hear testimony offered to show that the store occupied by Morton Hoffman was set on fire by him with the intention to defraud the defendants, or was occasioned by his negligence, or other fault. We do not think that the judge erred. If the fire happened in consequence of any negligence or fault on the part of the plaintiffs' agent, the testimony to prove it was irrelevant, as it is now well settled, both in England and the United States, that the underwriters are answerable for a loss occasioned by the negligence of persons in charge of the property insured; and such is the law both in fire and marine policies. It rests upon the familiar principle that *causâ proxima non remota spectatur*; fire being considered as the proximate

cause of the loss, though the remote cause of it may be traced to some carelessness or negligence of the assured, or his agent, or servant; but such carelessness or negligence must be unaffected by any fraud or design on the part of the assured. Fraudulent losses are necessarily excepted, no man being permitted in a court of justice to avail himself of his own turpitude as a ground of recovery in a suit. 1 Phillips on Insurance, 632; *Palapasco Insurance Company v. Coulter*, 3 Peters, 222; *Columbia Insurance Company v. Lawrence*, 10 Ib. 517; *Waters v. The Merchants' Louisville Insurance Company*, 11 Ib. 218.

In relation to the testimony offered to prove that Hoffman designedly set his store on fire to defraud the defendants, the judge thought, and we think correctly, that it should be excluded, as the plaintiffs were not in the least degree implicated in the charge. Hoffman, it appears, had two policies underwritten by the defendants, the one now sued on, which expressly purports on its face to be for the account of the plaintiffs, although made out in his name; and the other for his own account on goods in the same store. If, to accomplish his own fraudulent purposes, Hoffman committed the act he is charged with, are the plaintiffs to suffer for it, when it is not even intimated that they were in any manner cognizant of, or privy to, the deed? Should this wicked and unauthorized conduct on the part of their agent affect them any more than if it had been that of a stranger? It is true the principal is liable to third persons in a civil suit, for the frauds, deceits, misrepresentations, &c., of his agent, in the course of his employment, although the principal did not authorize, or justify, or participate in such misconduct, nor even know of it; but the just and necessary limitation of this general rule is, that such frauds, deceits, misrepresentations, &c., must occur in the course of the agency; and he is not responsible for the agent's wilful, malicious, and unauthorized acts in matters beyond the agency. Story on Agency, §§ 452, 456. If, for instance, in effecting the insurance the agent makes a false representation or concealment, such false representation or concealment will be considered as that of his principal and will have the same effect on the policy as if made by the principal, it being an act within

the scope of the agency, and in doing which he represents the principal; but in the present case, the act charged to Hoffman and offered to be proved, cannot be considered as done in the execution of the authority given him, when it is not pretended that the plaintiffs were participants in the fraud. *McMannus v. Crickett*, 1 East's Rep. 106; *Foster et al. v. The Essex Bank*, 17 Mass. Rep. 479; *Ware v. The Barataria & Lafourche Canal Company*, 15 La. Rep. 170; *Gaillardet v. Demaries*, 18 La. 490.

The next bill of exceptions is taken to the opinion of the judge, rejecting as evidence the record of a suit in the commercial court between Morton Hoffman and the defendants, which is stated to have been offered by the latter, to prove fraud and false swearing on the part of Hoffman, and for the purpose of enabling them to show what portion of the property belonged to the plaintiffs, and what portion belonged to Hoffman individually. The judge's opinion appears to us correct. It does not appear from the bill of exceptions, nor is it pretended by the defendants' counsel, that the fraud and false swearing sought to be shown took place in relation to the plaintiffs' claim and under their policy. If the evidence offered was to prove such fraud and false swearing on the part of Hoffman in his own case, and for his own purposes, it was clearly irrelevant, as in so doing, he was not acting as their agent, and they are only answerable for, and can only be affected by, such of his acts as are done in the course of his employment. The plaintiffs, moreover, were not parties to the suit in the commercial court. It is *res inter alios acta*, and cannot be used against them.

A third bill of exceptions was taken to the admission of Hoffman's testimony, which was objected to on the ground that he had sworn to a statement of the loss as being the amount of his loss; that he was charged in the answer with being the real plaintiff; and that the defendants had expressly charged that the fire was caused by the fraud or negligence of said witness, with the view of defrauding them. We think that the judge decided rightly. The affidavit was made by the agent named as such in the policy. When he swore to the loss as his, such an oath necessarily referred to the character in which he was recognized and acted when he effected the insurance. As to the mere alle-

Parol Agreement to insure.

gations of an answer, they cannot be considered as sufficient to exclude any witnesses offered by the plaintiff in a cause. When the jury were about to retire, the defendants moved the court to charge them, that the sale of the damaged goods at auction without the consent of the underwriters, was not a proper criterion by which to ascertain the damage done to the property insured. The consent of the defendants that a sale of the goods should be made at auction having been shown in the present case, the judge refused, and properly, we think, to instruct the jury as required. The question as to what course should have been pursued, had no such consent been given, was not before the jury. The instruction called for was not, therefore, necessary to assist them in deciding the case.

On the merits, the evidence, in our opinion, sustains the verdict of the jury.

Judgment affirmed.

SANDFORD, Receiver, &c. *vs.* THE TRUST FIRE INSURANCE COMPANY.¹

(Chancery, New York, April, 1845.)

Parol Agreement to insure.

Where a parol agreement was made with the president of an insurance company to insure the buildings of the assured, and the president made a brief memorandum of the terms of the agreement upon the application book of the company, but no policy was made out pursuant to such agreement, because the assured gave notice to the company that he wished to have the risk differently apportioned, and no premium was paid or secured, nor was the premium charged to the assured; and the assured was notified that he must come to the office and settle the business or the company would not consider itself liable in case of loss, but the assured did not call, nor did he pay or secure the premium: *Held*, that the parol agreement to insure was not a consummated contract, and that the company was not liable for a loss which subsequently occurred.

Whether a parol agreement to insure is valid by the law of the state? *Quære.*

THIS was an appeal from a decree of the late assistant vice-chancellor of the first circuit dismissing the complainant's bill. The bill was filed by the complainant, as the receiver appointed in a creditor's suit against Cowles Brother & Co., to recover compensation for a loss of the property of that firm by fire on the 17th of August, 1839, under an alleged agreement of the

¹ 11 Paige, 547.

Trust Fire Insurance Company to insure the same for one year from the first of July, 1839. The facts as they appeared from the pleadings and proofs were as follows: Cowles Brother & Co., consisting of H. B. Cowles, T. G. Cowles, and E. H. Hodges, were the owners of the chemical works situate on Troy Street, in the city of New York, called the Manhattan Chemical Works. In June, 1839, Dammers, the surveyor of the respondents, applied to H. B. Cowles, with whom he was acquainted, to know if his firm did not wish to insure, and being informed that they did, he took a survey of the part of the chemical works on the south side of Troy Street, upon the stock, fixtures, engines, and buildings, of which they proposed to insure \$5,000. But as they were then unwilling to pay the premium which Dammers supposed that the company would ask, the matter remained open until the evening of the fire of July thereafter. On that evening Dammers, the surveyor, and Wheelwright, the president of the insurance company, met H. B. Cowles by accident at the Sans Souci Hotel, where the president was introduced to Cowles as one of the firm who had proposed to insure upon the chemical works on the south side of Troy Street. And after considerable conversation as to the amount of the premium, &c., the president agreed verbally to insure \$5,000 on the premises, for one year, at one and a half per cent. premium, to be divided as follows: \$3,000 upon the stock of the firm, \$1,000 upon the fixtures, including the steam-engine, and \$1,000 upon the buildings, the time to commence on that day. The next day the president made a brief memorandum of the terms of the agreement upon the application book of the corporation, except that in such memorandum the name of the firm of Cowles Brother & Co. was not correctly stated, nor was there any description of the character of the building to be insured. No policy was made out, as H. B. Cowles a few days after the 1st of July saw Dammers, the surveyor, and told him that he wanted the risk differently apportioned, and no premium was paid, nor was any premium note given, nor was there any charge made upon the books of the corporation against Cowles Brother & Co. for the premium. Dammers, the surveyor, by the direction of the president, spoke to H. B. Cowles several times, to call at the office of the corpo-

Parol Agreement to insure.

ration and determine as to the distribution of the risk so as to have the insurance completed, but he neglected to do so, and a few days before the fire Dammers again called on him, and told him that he must come down and settle the business that afternoon, or the insurance company would not consider itself liable for any loss. But H. B. Cowles did not go down, nor give any information to the officers of the company as to how the risk should be apportioned, nor did Cowles Brother & Co. ever pay, or offer to pay, the premium for the insurance before the fire occurred, although by the published proposals for insurance by the corporation, one of the conditions was that no insurance, whether original or continued, was to be considered as binding until the premium was paid. Shortly after the fire, Cowles Brother & Co. made a claim upon the corporation, but upon being told by the president the reason why he did not consider the corporation bound for the loss, nothing further was said. And having rebuilt their works, in the following October they insured them with this company, and took out a policy and paid the premium charged for the risk, which was two and a half per cent. They subsequently failed, and a creditor's bill having been filed, and a receiver appointed in that suit, in December, 1839, the complainant as such receiver, on the 19th of March, 1840, made a claim upon the corporation for the loss, and then furnished the preliminary proof of loss.

E. H. Owen & A. S. Johnson, for the appellants.

G. N. Titus, for the respondents.

THE CHANCELLOR. From the view I have taken of this case, it is not necessary for me to decide the question whether a parol agreement of insurance, not evidenced by writing in any way, is valid and binding, or whether there is anything in the charter of this particular corporation to prohibit it from contracting to insure by a mere parol agreement, not evidenced by writing and subscribed by some of the agents of the corporation. In England the stamp act necessarily requires all contracts for insurance to be in writing. The French Code also requires the contract to be in writing. Com. Code of Fr. book 2, art. 332. And the Spanish law is the same in substance. Span. Code of Com. arts. 812, 841. Millar says the importance of the contract of insurance, and the singularity of those obligations which it is

Parol Agreement to insure.

intended to create, have, in all commercial states, rendered a deed in writing essential to its validity. Millar on Ins. 30. But he refers to no authority and I have not been able to find anything in the common law of England rendering it absolutely necessary that contracts for insurance should be in writing, although the custom has been, so far as I can ascertain, to have some written evidence of the agreement to insure. A policy of insurance necessarily imports a written contract, as the name of the instrument, derived from the Italian, necessarily implies. I am not prepared to say, however, that in this state there may not be a valid parol agreement, founded upon a good consideration, to execute a written policy of insurance which a court of equity may enforce, although there is no written evidence whatever of the agreement, or of any of its stipulations or conditions.

The agreement in the case under consideration, however, was clearly not a consummated contract of insurance; and neither of the parties could have so understood it, at the time it was entered into. But it was an agreement on the part of Wheelwright, that the corporation, of which he was the president, would give to Cowles Brother & Co. a policy in the usual form, and upon the usual conditions of insurance by such corporations, insuring \$5,000, upon the premises, for one year from the 1st of July, 1839, upon being paid the premium of one and a half per cent. for the risk; such risk to be apportioned as then stated unless the assured, previous to the consummation of the insurance, should desire to have such apportionment of the risk changed. And both parties unquestionably understood that if a loss should occur before the insurance could be consummated in the usual form, the corporation would be answerable therefor. But as there was no agreement to give the premium, and no implied agreement for a credit beyond the time which was necessary to prepare the policy, the neglect of Cowles Brother & Co. to pay the premium after they were called upon to complete and consummate the insurance, would of itself have been such an abandonment of the agreement of the 1st of July, 1839, as to deprive them of all right to claim pay for the subsequent loss, either at law or in equity. In this case also, the notice given by H. B. Cowles, a few days after the 1st of July, that the apportionment of the risk as then specified was not

Parol Agreement to insure.

right, and that he wished it changed, was of itself an abandonment, or at least a suspension of the contract, until the apportionment should be adjusted according to his wishes, and he having been expressly notified that if he did not come to the office and complete the arrangement by a particular time, then the insurance company would no longer consider itself holden to insure, or to be responsible for any loss that might thereafter occur, his neglect to attend, as requested, put an end to the previous agreements to insure; so that neither party was thereafter bound, either at law or in equity, to proceed further in the consummation of the bargain. The notice, given by the corporation, was an election on their part to abandon their claim to the premium unless the contract should be completed, if they ever had any legal claim upon Cowles Brother & Co. therefor. And the neglect of the latter to pay the premium or to enable the insurance company to execute and tender the policy, because the distribution of the risk was not ascertained, put an end to all pretence on the part of those who were to have been insured, for any subsequent loss they might sustain. And after what occurred at the last interview between Dammers and H. B. Cowles, previous to the fire, in connection with the other evidence in this case, I am perfectly satisfied that Cowles Brother & Co. would not have considered themselves under any legal or even honorary obligation to pay the premium had no subsequent loss taken place.

In deciding this case I lay entirely out of view what H. B. Cowles testified to, on his examination before the master in the creditor's suit. The insurance company, not being a party to that proceeding, had no right to cross-examine; and his examination is not legal evidence against the respondents in the case, for any purpose. Besides, he was directly interested against the insurance company in relation to the matter of that examination. For whatever might be recovered by the receiver would, at the termination of the creditor's suit, either be applied to pay the debt of the firm, or if the complainant in that suit did not succeed in obtaining a decree against Cowles Brother & Co., the funds in the hands of the receiver would of course be paid over to them. The proceedings upon the creditor's bill, therefore, are not legal evidence, in this suit, for any

Waiver. — "Forthwith." — Diligence.

other purpose than to show that the present complainant had been duly appointed a receiver of the property and effects of the firm of Cowles Brother & Co., and the time of such appointment; and that they had assigned such property and effects to the receiver, to abide the further order of the court in that suit. And upon the evidence which was properly before the assistant vice-chancellor, I have no doubt that he arrived at the correct conclusion that the appellants were not liable, either at law or in equity, for the loss occasioned by the fire of August, 1839.

The decree appealed from is therefore affirmed with costs.

It is well settled that after the application for insurance has been approved and payment of the premium made or secured, the contract is complete without the execution of a policy. *England Ins. Co.* 25 N. H. 169 (1852); *Chase v. Hamilton Ins. Co.* 22 Barb. 527 (1857); *Whittaker v. Farmers' Union Ins. Co.* 29 Barb. 312 (1859). *Goodall v. New*

RICHARD EDWARDS vs. THE BALTIMORE FIRE INSURANCE COMPANY.¹

(Court of Appeals, Maryland, June, 1845.)

Waiver. — "Forthwith." — Diligence.

Where there is a formal defect in the preliminary proofs offered by an assured to the underwriter, which could have been supplied had an objection been made by the underwriter to payment on that ground, but the underwriter put his refusal to pay on other grounds, the production of further preliminary proofs will be considered as waived.

Where the answer of the underwriter stated that the proofs were wholly unsatisfactory as to the amount of the loss; that all responsibility was denied by reason of a material concealment as to the character of the risk; that all claim had been forfeited under a particular article of the policy, and he also reserved all objections to recovery in any form, and without intending to waive any of the rights under the policy, this is not a waiver that the notice of the loss, by fire, was not "forthwith" given, and a particular account of the loss or damage, "as soon as possible after," delivered by the assured to the assurers, in conformity to the article in the policy, under which the claim was alleged to be forfeited.

The loss took place in November, and the objection was made in March; notice given or an account of loss delivered, in March, would not have been a compliance with the policy.

The terms, "forthwith" in a policy of insurance, used in connection with giving notice to the underwriter of the occurrence of a loss by fire — and "as soon as possible" after a fire occurs, deliver a particular account of such loss, are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case.

¹ 3 Gill, 176.

Waiver. — "Forthwith." — Diligence.

In all ordinary cases, whether due diligence has been used by the assured; or he has been guilty of no unnecessary procrastination or delay, under all the circumstances of such cases, are questions of fact, to be determined by the jury.

A policy of insurance, executed in Baltimore, against fire on merchandise in a house at F., required the assured forthwith to give notice to the underwriter of any loss. The mail left F. on Monday, Wednesday, and Friday, for Baltimore. The fire took place on Friday night, and the assured did not give notice by mail on Wednesday. All the circumstances attending the condition of the property, and the efforts of the assured to collect and preserve it in its damaged state, were left to the jury to determine, whether the assured was not so occupied on Tuesday, in doing everything in his power for the safety and protection of the property, as to show he had neither time nor opportunity to put the notice in the post-office, in season for the mail of that day.

APPEAL from Baltimore county court.

This was an action of covenant upon a policy of insurance against fire, brought on the 12th November, 1842, by the appellant against the appellee, who pleaded *non infregit conventionem*.

The plaintiff, to support the issue on his part, gave in evidence his application for insurance.

"Baltimore, Sept. 28th, 1839.

"To the President and Directors of the Baltimore Fire Insurance Company.

"The subscribers want insurance on account of Richard Edwards, — desire to be insured against loss or damage by fire, for the term of one year, to the amount of \$5,000, on the property described below; that is to say, on merchandise, such as is kept in a country store, in a frame building, now occupied by R. E., located between two mountains, standing alone. Frame stable about one hundred yards from the store. A furnace about five hundred yards from the store. In Farrandsville, Clinton county, Pennsylvania, near the canal. If any loss should happen, the amount of said loss to be paid to Hooper & Graff, they showing legal claim against the said Edwards.

"Hooper & Graff."

"What premium will be required?"

"\$5,000 at one per cent., \$50."

"Baltimore, 28th September, 1839. — Accepted, Hooper & Graff."

Also: —

"Baltimore Fire Ins. Office, 1st Oct. 1839.

"Mr. Hooper — Dear Sir: You will please call at the office as soon as you can make it convenient, as I cannot make out your policy before I see you.

Respectfully,

"W. A. Tucker, Pres't."

Waiver. — "Forthwith." — Diligence.

"Baltimore Fire Ins. Office, 19th Oct. 1839.

"Dear Sir: If you should be passing by my office, please call in.

Respectfully yours,

"W. A. Tucker, Pres't.

"Messrs. Hooper & Graff."

The policy of insurance, dated 23d October, 1839, was in conformity to the order for insurance.

The 7th article of the policy made it the duty of all persons insured, in case of fire, to do everything in their power for the safety and protection of the property insured; and all persons insured by this company, sustaining any loss or damage by fire, are forthwith to give notice to the company; and as soon after as possible, to deliver in as particular an account of their loss or damage, signed by their own hands, as the nature of the case will admit; and make proof of the same by their oath or affirmation, and by their books of accounts, and other proper vouchers as shall be reasonably required, and shall make oath whether any, and what other insurance is made on the same property, and shall procure a certificate under the hand of a magistrate, or notary public (most contiguous to the spot where the fire happened, and not concerned in such loss), that they are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe, that he, she, or they, really and by misfortune, and without fraud or evil practice, have sustained by such fire, loss or damage to the amount therein mentioned; and until such affidavits and certificates are produced, the loss shall not be payable. So also, if there appear any fraud or false swearing, the claimant shall forfeit his claim to restitution or payment by virtue of this policy.

The plaintiff also proved the following letters, admitted to have been received by the company: —

"Baltimore, Nov. 26th, 1839.

"Wm. A. Tucker, Esq., President, &c.

"Sir: We, yesterday, received information of the destruction, by fire, of the property insured by you, by policy No. 5959 (dated per application, September 28th, 1839, in the name of Richard Edwards), which insurance was effected by us, and to be paid to us if loss should take place; we shall immediately

Waiver. — "Forthwith." — Diligence.

take steps to procure the necessary proofs of the loss, amount of property destroyed, and furnish you with the same. You will, therefore, hold the same subject to our order and adjustment.

Respectfully yours,

"Hooper & Graff."

Also : —

"Baltimore, Dec. 28th, 1839.

"Wm A. Tucker, Esq., President, &c.

"Sir: We lay before you this day, papers showing the loss by fire, on policy No. 5959, which you will examine.

"Respectfully,

"Hooper & Graff."

Also : —

"To the P. and D. of the B. F. Ins. Co.

"Gent.: You will take notice, that I did, on the 7th December, 1839, transfer all my right, title, claim, and interest in policy No. 5959 (Baltimore Fire Insurance Co.) to Messrs. Hooper & Graff. You will, therefore, account to them for the loss sustained on said policy, and their receipt will be good for the same.

"Respectfully,

"Richard Edwards.

"Baltimore, Jan. 9th, 1840."

"Baltimore F. Ins. Office, Jan. 13th, 1840.

"Dear Sir: I wish to see your books and other papers, in relation to your loss under the policy from this office.

"Respectfully,

"Wm. A. Tucker, Pres't.

"P. S. — On reflection, I wish, also, to see the bills of parcels of your purchases. You will please call at the office as soon as convenient.

Wm. A. Tucker, Pres't.

"(Mr. Richard Edwards, Farrandsville, Clinton county, Pennsylvania. — Care of Hooper & Graff, Baltimore.)"

"Baltimore, Jan. 14th, 1840.

"W. A. Tucker, Esq., Pres't B. F. Ins. Co.

"Sir: In reply to your note of yesterday, I must beg leave to refer you to Messrs. Hooper & Graff, as you are well aware they are the only persons authorized to settle the claim in the policy No. 5959.

Richard Edwards."

Waiver. — "Forthwith." — Diligence.

Also : —

" Baltimore, February 11th, 1840.

" To the P. and D. of the Baltimore F. I. Co.

" Gent. : We beg leave respectfully to inform you, that the books of account of Richard Edwards of, &c., showing the amount and value of the merchandise covered by your policy of the 23d of October, 1839, No. 5959, and subsequently destroyed by fire, as you have been already advertised, are in our possession, at our office in North Street, subject to your examination at your pleasure, for which purpose we will deliver them to you, if desired ; and that we are ready to furnish any other proof in addition to that already communicated, which you may reasonably require, of the fact and extent of said loss.

" We have the honor to be,

" Very respectfully, your obedient serv'ts,

" Nelson & Buchanan, Att'ys for R. E."

Also : —

" Baltimore F. Ins. Office, March 3d, 1840.

" To Richard Edwards, Esq.

" Sir : The books and papers you have left for the inspection of the company, to sustain your claim for loss under a policy effected at this office, were so numerous, that I am only able now to state, after their examination, that this company considers them wholly unsatisfactory as to the amount of your claim, even if the company were responsible at all. They deny, however, any responsibility, by reason of a material concealment as to the character of the risk ; and even if the policy ever had attached, by reason of the circumstances attending the fire, if any responsibility ever had existed, it has all been discharged, and your claim forfeited under the 7th condition of insurance, annexed to the policy ; for you have, on oath, rendered an account of loss, in which you estimate a lot (of goods) at Lockhaven as worth \$150 ; which, in the first place, was never intended to be included in the policy ; and, in the second place, we suppose, was not consumed by fire. With a reservation of all objections to your recovering, in any form, and without intending to waive any of our rights under the policy, we leave you to pursue any course you may deem expedient.

" Respectfully,

" W. A. Tucker, Pres't."

Waiver. — "Forthwith." — Diligence.

The plaintiff offered proof of the location and condition of the store, and its contents; the goods left, after the fire, were removed to an adjacent building; many in a bad condition, soiled and rumpled, and were then in the possession of the sheriff of the county, who had commenced arranging them, for the purpose of making an inventory. The witness, on the next day (Saturday), assisted the sheriff, who was then absent two days, and locked up the goods; as soon as an inventory was finished, a copy was made and sworn to by plaintiff. After the inventory and affidavit were finished, they were put into the post at Farrandsville, directed to Hooper & Graff, Baltimore. The inventory and affidavit were procured for the plaintiff as soon as they possibly could be done. They were engaged two or three days in taking the inventory. Witness, when in Baltimore, went to the office of defendant, and there saw the copy of the inventory, which he sent to Messrs. Hooper & Graff, from F., in the possession of Mr. Tucker, the president of the company. Mr. Buchanan stated, that witness was Mr. Edwards' clerk, and had brought down all the books and papers, and they were now ready to go into an examination of them, to which Capt. Tucker replied, he had no time then for an examination, but would like to have the books and papers sent to the office, so that he could examine them at his leisure. The interview with Capt. Tucker was in the latter part of January or February, 1840, and there was but one. Deponent reached Baltimore on the third day after he left Farrandsville; the plaintiff was in F. from the time of the fire until January. The goods were levied on by the sheriff, after the fire, under execution.

Evidence was also given by the plaintiff, of the visit of Hooper to the president of the company; the delivery of the inventory and various accounts, and that the loss was disputed by the company, because Capt. Tucker contended, in a conversation he had with Edwards and Hooper, that they had not performed the conditions of the policy, in rendering an account, whereby the company could ascertain the loss; and also complained to Mr. Hooper, as the agent of Edwards, of the delay in transmitting the account and statement of loss; and Capt. Tucker complained to witness, that the company had not been

notified of the sheriff's sale, which took place after the fire, so that the company had no opportunity of appointing appraisers, to ascertain the partial loss, as provided for by one of the conditions of the policy.

The plaintiff also proved the burning of his store on the evening of the 18th November, 1839; that the sheriff who levied upon the goods did not authorize the taking of any inventory, except when he was present; that the plaintiff offered to assist him in taking it, and he had the assistance of his clerk in part. The sheriff took possession on the 21st November, 1839, and commenced his inventory on the 22d, and completed the same on the 14th December. The confusion from the fire produced much delay. Edwards could not have obtained a copy until the sheriff completed his. The sheriff's sale commenced on the 16th December, 1839, was adjourned from day to day, and completed 8th January, 1840. The inventory comprised about twelve pages of folio paper. The distance from Lockhaven to Farrandsville is about seven miles. Witness was not certain whether the mail came daily from F. to L., or every other day, from the 21st November, 1839, to the 1st January, 1840. From Lockhaven to Baltimore, there was then, and is now, a daily mail. The F. and L. mail are united at L. The sheriff had exclusive possession, on and after the 21st November, 1839, of the injured and remaining goods. The plaintiff was not at home on the evening of the fire; he had gone to Lockhaven, and returned about ten o'clock, after the fire. There was a post-office at Farrandsville, and the mail left there on Monday, Wednesday, and Friday, for Baltimore, and if no accident happened, a letter would arrive in B., from F., on the night of the third day, and be delivered on the morning of the fourth day. It was tri-weekly at F. in 1832. In the spring of 1840, it was daily. The mail did not leave F. regularly, and frequently failed to connect at Williamsport. In 1839, there were three contracts for carrying the mail between F. and Northumberland, which was the distributive office; that six or eight days would not be unreasonable from F. to Baltimore, as the roads were obstructed at that time from the 20th of the month. From F., the mail, in December, would be very uncertain. The mails from N. to B., in Baltimore, were as follows :

15th November, received on the 16th; 17th on the 18th; 18th none; 19th on the 20th; 20th to 27th, each on the day following; to 1st December, none.

The plaintiff also proved, that before the 11th February, 1840, his counsel called on the defendants, and requested to see the preliminary proofs of loss, furnished them by the plaintiff, but that the defendants refused to show him the same, and that before the trial of this case, notice was given to the defendants to produce the same in court, which they have refused to do.

The plaintiff prayed the court to instruct the jury, "That if they believed the facts set out in the foregoing statement, the defendants have waived the adduction, by the plaintiff, of the preliminary proofs required by the conditions annexed to the policy of insurance, and that such waiver dispenses the plaintiff from now offering evidence of his having furnished the same."

The defendants prayed the court's opinion to the jury as follows:—

1st. That if they find from the evidence, that the house, in which the goods insured were at the application for the insurance, was used as a dwelling-house, that then the policy in this case is void under the 2d article of the conditions annexed to the policy in question, because the description of the same in the application for insurance, was false.

2d. If the jury find the facts stated in the first prayer, and also find, that if said house had been truly described as occupied as a dwelling, that the risk of the insurance would, in the opinion of the underwriters, have been considered as enhanced, and a higher premium have been charged than was charged in this case, that then the plaintiffs are not entitled to recover, the policy being void under the 2d article of the conditions of insurance attached to said policy.

3d. That the plaintiffs are not entitled to recover, because they have not offered evidence that they forthwith gave notice of the loss to the defendants, or as soon as possible after the fire occurred delivered to them the particular account of their loss or damage, signed by them, as the nature of the case admitted; and made proof of the same by oath, and by his books and accounts, and other proper vouchers, as required by the 7th condition attached to the policy.

4th. That the true construction of the policy of insurance in this case is, that the insurance was effected for the benefit of Hooper & Graff, the persons applying for the same, as evidenced by the order for insurance of the 28th September, 1839, given in evidence by plaintiff, and the terms of the policy itself; and that no recovery can be had in this case for any loss, which the jury may find from the evidence, occasioned to the goods insured, without evidence that said Hooper & Graff had a legal claim against said Edwards, the plaintiff, and if there be any evidence, then, only to the extent of any such claim as may be shown by evidence.

The court (Le Grand, A. J.) rejected the prayer of the plaintiff, and also rejected the first, second, and fourth prayers of the defendants, and granted the third prayer of defendants.

To the rejection of the plaintiff's prayer, and the granting of the third prayer of defendants, the plaintiff excepted, and prosecuted this appeal.

The cause was argued before Archer, C. J., Dorsey, Spence, and Martin, JJ., by *Nelson* and *W. F. Giles*, for the appellant, and by *R. Johnson & David Stewart*, for the appellees.

DORSEY, J., delivered the opinion of the court.

The bill of exceptions taken by the appellant in this cause is to the county court's refusal to grant the prayer made by him, and to the granting of the third prayer of the defendants.

The plaintiff prayed the court to instruct the jury, "That if they believed the facts set out in the foregoing statement, the defendants have waived the adduction, by the plaintiff, of the preliminary proofs required by the conditions annexed to said policy of insurance, and that such waiver dispenses the plaintiff from now offering evidence of his having furnished the same."

Assuming that the letter of the defendants, of the 3d of March, 1840, was a flat denial of the plaintiff's right to recover, upon a ground going to the merits of the plaintiff's claim, and having no reference to the preliminary proofs thereof, to be furnished to the defendants (which, for the plaintiff, is the most favorable light in which it could be regarded), the plaintiff's prayer was properly rejected by the court. It carried the doctrine of implied waiver of preliminary proofs far beyond any

of the cases referred to in support of it, and farther than it can be legitimately extended upon the principles on which it is founded.

In the case of *Allegre v. The Maryland Ins. Co.* 6 Har. & John. 408, the preliminary proof omitted to be furnished to the underwriters was the invoice of the cargo insured, which, with all the preliminary proofs requisite in that case, were of such a character that furnishing them by the insured, at the date of the letter from the insurance company, would have been a sufficient compliance with the provisions of the policy in respect to the preliminary proofs; and a requisition for their production could, by the assured, at once have been complied with.

The principles upon which the waiver of preliminary proofs depend are correctly stated in the case of *McMasters & Bruce v. The Western Mutual Ins. Co.* 25 Wend. 382, where the court say, "The law is well settled, that if there be a formal defect in the preliminary proofs, which could have been supplied had an objection been made by the underwriters to pay on that ground; if they do not call for a document, for instance, or make an objection on the ground of its absence or imperfection, but put their refusal upon other grounds, the production of such further preliminary proofs will be considered as waived." And, speaking of the interviews between the insured and the agents of the company, the court further say, "Had the objection been made in the course of these interviews, the defects might at once have been remedied."

In the case of the *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 401, Chancellor Walworth says: "The law is well settled in this state, that if there is a formal defect in the preliminary proofs required by the policy or the custom of the place, and which could probably have been supplied had any objection been made by the underwriters to the payment of the loss on that ground; if the insurers do not call for the document, or make no objection on the ground of its absence or imperfection, but put their refusal to pay distinctly on some other ground, the production of such further preliminary proof will be considered as waived." And in *Ocean Ins. Co. v. Francis*, 2 Wend. 71, it is decided, that "where the underwriters make no objection to the sufficiency of proof of interest, but put their refusal to pay

on the ground that they are not liable for the loss, it is a waiver of preliminary proof of interest." Why is it such waiver? Because, had the objection been then raised, the proof of interest, according to the stipulations of the policy, could then, and would, have been adduced by the assured.

But what is the objection to the sufficiency of the preliminary proofs in the case now before us? It is, that the notice of the loss by fire was not "forthwith" given, and a particular account of the loss or damage, "as soon after as possible," delivered by the assured to the assurers. Suppose the objection had been raised in the letter of the president of the insurance company of the 3d March, 1840, could the appellant have bettered his condition? Would notice then given, or an account of loss then delivered, have been a compliance with the conditions of the policy? Unquestionably not. There is no ground, therefore, for the implication of the waiver insisted on by the appellant. He could not have removed the objection had it been made; he has sustained no injury by its non-disclosure. The conduct of the appellees has lulled him into no false security; has prejudiced him neither in the way of fraud nor surprise. Suppose, however, it were otherwise, and that the objection, if raised, could then have been obviated by the appellant, we think the letter of the underwriters of the 3d of March, 1840, repels every presumption of any waiver on their part, and is an explicit warning and annunciation to the appellee that they designed to waive nothing, and that on the trial of any action which he might institute against them, he must come prepared to prove everything, which, according to the terms and conditions of the policy of insurance, it was necessary to prove to entitle him to recover.

For the reasons we have stated, we think the county court were right in rejecting the appellant's prayer.

The third prayer of the appellees, to the granting of which the appellant has excepted, is, "That the plaintiffs are not entitled to recover, because they have not offered evidence that they forthwith gave notice of the loss to the defendants, or as soon as possible after the fire occurred delivered to them the particular account of their loss or damage, signed by them, as the nature of the case admitted; and made proof of the same by

his oath, and by his books and accounts, and other proper vouchers, as required by the 7th condition attached to the policy."

To enable us to judge of the correctness of the court's conduct in granting this prayer, the meaning of the terms "forthwith" and "as soon as possible," as used in the policy of insurance, ought to be ascertained. To give to them their literal import would, in almost every case of loss by fire that occurs, strip the insured of all hope for indemnity for the loss incurred, and policies of insurance against fire would, as to the insured, instead of being contracts of indemnity, as they profess to be, become engines of fraud and injustice in the hands of the underwriters, and a recovery by the insured would be rarely, indeed if ever, practicable. Such a construction, therefore, has not been sanctioned by courts of justice. The true meaning of those terms is, with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. See *Inman v. Western Fire Ins. Co.* 12 Wend. 461, where it was determined that "forthwith," in such a policy, imposes upon the insured nothing more than what is called due diligence under all the circumstances of the case ; " and *Cornell v. Le Roy*, 9 Wend. 166, where it was decided that "the assured is, as soon after the fire as possible, to deliver in a particular account of such loss or damage, and this means no more than it is to be done with due diligence under all the circumstances of the case ; there is to be no unnecessary procrastination or delay."

In all ordinary cases, whether due diligence has been used by the insured, or he has been guilty of no unnecessary procrastination or delay under all the circumstances of the respective cases, are questions of fact to be determined by a jury. We cannot assent to the proposition contended for by the appellees, that the same transmission of notice of loss necessary to constitute due diligence on the part of the insured in this case, that according to "The Law Merchant," and an unbroken chain of decisions of courts of justice, is deemed due diligence by the holder of a bill of exchange or promissory note, seeking to charge those contingently liable for the payment thereof, viz.: that notice must be transmitted to those sought to be

charged by it, by the next mail after the dishonor of the bill or note. Such a rule, as an unbending principle of law, has not, and we think ought not, to be applied to contracts like that now before this court. And in reference to such contracts, we entirely concur with the views and principles so perspicuously and forcibly stated in note (p) to page 451 of 1 Stark. on Ev., as follows: "In general, questions of reasonable time, reasonable care, due diligence, probable cause, and such like, depend so much on their own peculiar circumstances as not to admit conveniently of any general rules, and it is of greater convenience to depend on the judgment and discretion of a jury, deciding on a comparison of the circumstances with the ordinary course of practice, or with reference to the ordinary principles of fair and honest dealing, than to introduce such a multiplicity of legal rules and definitions as would be necessary for the due decision of cases, subject to such infinite variety of circumstances. It is, in truth, a matter of importance and obvious policy, rather to refer questions of this nature as matters of fact to a jury, than to frame legal rules applicable to particulars. The difficulty of framing precise rules must, in such circumstances, be very great, for the reasons adverted to, unless they be founded on some prominent and decisive incidents. Whenever the court decides upon circumstances, the decision would become a precedent and rule of law, and as such decision would afford room, by comparison, for a great number of distinctions, the obvious effect would be to multiply such decisions and distinctions to a very inconvenient and burdensome extent. On the other hand, by abstaining from legal decision, except in cases where some decisive rule or principle of law is clearly applicable, and by adopting in others the inference of the jury, in point of fact, substantial justice is administered in simplicity, and free from perplexity occasioned by nice and subtle distinctions and conflicting decisions. And this is an advantage, and by no means an unimportant one, incident to the system of trial by jury; the law can thus deal in general definitions, and leave the rest as fact to the jury, without multiplying decisions and precedents; but if the judges, and not the jury, were to decide, every decision would become

a precedent, and legal distinctions would be multiplied to an excessive extent."

According to the facts in this case, as appearing on the record, would it be irrational in the jury to conclude, that the plaintiff had been guilty of no want of due diligence in not forwarding a notice of the loss by the mail of Wednesday, by reason of his being so occupied on Tuesday in doing "everything in his power for the safety and protection of the property insured," which, by the express terms of the policy, he was bound to do, that he had neither time nor opportunity to put the notice in the post-office in time for the mail of that day?

The defendants' third prayer, withdrawing from the consideration and finding of the jury the question as to due diligence in giving notice of the loss by fire, and the question whether there was any unnecessary delay in delivering the particular account of the loss, we think that in granting that prayer the county court were in error.

But, conceding that we are wrong in the opinion we have expressed, as to the tribunal by which the question of due diligence in giving notice to the insurance company of the time of loss is to be determined, and that to show due diligence the plaintiff must prove that such notice was put into the post-office in time for the next mail (after the fire) from Farrandsville to Baltimore, the county court, in granting the third prayer of the defendants, took that fact from the consideration of the jury, and determined it in the negative; although there was evidence before the jury from which it was competent for them to find, if they believed from the evidence the fact so to be, that such notice was put into the post-office in time to have been transmitted in the first mail, after the fire, from Farrandsville to Baltimore. On this ground, if all others were wanting, we think there is error in the court below in giving to the jury the instruction, prayed for in the defendants' third prayer.

We concur with the county court in its rejection of the plaintiff's prayer, but dissent from its granting the defendants' third prayer, and therefore reverse its judgment.

Judgment reversed and procedendo awarded.

Loss. — *Pro rata* Adjustment.

ZERAH H. COSTON *vs.* THE ALLEGHANY COUNTY MUTUAL
INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, September Term, 1845.)

Loss. — Pro rata Adjustment.

In the case of an insurance in a mutual company, if a loss occur requiring the proceeds of all the deposit notes and an assessment of one per cent. upon insured property, to meet the loss, the insured will not be compelled to submit to a *pro rata* adjustment of such funds with other parties insured, whose property has subsequently, before the notes are collected, been destroyed by fire.

CASE stated, as follows :—

“ The defendants are an incorporated company, deriving their charter from an act of the legislature of this state, passed the 4th day of April, 1844, which act is made part of this case.

“ On the 18th of May, 1844, the defendants issued to the plaintiff a policy of insurance, for the term of five years, for the sum of \$700, upon a certain frame house in the city of Alleghany, upon the deposit by him of his promissory note for the sum of dollars, and the payment of five per cent. in conformity with the act of assembly and the by-laws of said company.

“ On the 10th of April, 1845, a fire occurred in the city of Pittsburgh, and destroyed property insured by the company to an amount exceeding the aggregate of the premium notes deposited with the said company, inclusive of the amount paid thereon, together with the addition of one per cent. upon the whole amount insured.

“ On the 15th of May, 1845, the directors assessed upon the members of the company the sum of twenty per cent. upon the amount of the notes by them respectively given.

“ On the 16th of May, 1845, the house of the plaintiff, insured by the above mentioned policy, was consumed by fire, and the damages sustained were equal to the whole amount covered by the said policy, and due notice of the loss was given to the defendants.

“ On the 9th of June, 1845, the directors of the company, having ascertained that the whole of the deposit notes, includ-

¹ 1 Barr, 322.

Statement of Value. — Mistake.

ing the amount paid thereon, would not be sufficient to meet the liabilities incurred by the fire of the 10th of April and the 16th of May, in conformity with the charter did assess on the members the whole amount of the unpaid balance of their respective notes, and in addition one dollar on every one hundred dollars by them respectively insured in said company. The assets of the company, inclusive of the additional assessment of one per cent. just stated, were not sufficient to meet the losses occasioned by the fire of the 10th of April. The defendants had paid out to the losers by this last mentioned fire a dividend of twenty-two per cent. on the amount of their respective claims."

Judgment was given on the special verdict for the defendants, *Dunlap*, for plaintiff in error.

Williams, contra.

The opinion of the court was delivered by

BURNSIDE, J. The opinion of this court in the case of *W. & D. Rhinehart v. The Alleghany County Mutual Insurance Company*¹ decides that where a fire has happened, the company are bound, to the extent of their funds, to pay the loss, and that the losers have an immediate vested interest in the effects of the company. The company, in the case stated, where the law appropriates all the effects of the company to the first loss, has nothing left for a second loss by fire; there is nothing left for the fire of the 16th of May, 1845. The plaintiff has no ground to complain. He was a corporatee, and one of the company, and was bound to know the consequences of the fire of the 10th of April, 1845.

Judgment affirmed.

PITT HOLMES *et al.* vs. THE CHARLESTOWN MUTUAL FIRE INSURANCE COMPANY.²

(Supreme Court, Massachusetts, September Term, 1845.)

Statement of Value. — Mistake.

The statement of the value of the premises insured, made in the application, is conclusive upon the applicant.

If the statement of the property insured is definite, parol evidence will not be received to show that a mistake was made, and that the policy was intended to cover other property.

¹ *Post*, 424.

² 10 Met. 211.

THE case is stated in the opinion of the court.

Barton & Bacon, for the plaintiffs.

C. Allen, for the defendants.

HUBBARD, J. Several questions of some importance have been raised and argued in this case, which it is unnecessary to decide. The question on which the case turns is, What sum was actually insured? the defendants having paid all which they acknowledged to be due, before the trial of the action.

The policy itself is explicit. It assumes the risk as follows: Under the conditions and limitations expressed in the statute regulating mutual insurance companies, and the rules and regulations of the company, the sum of thirty-five hundred dollars on their meeting-house and fixtures in the same, situated in Worcester aforesaid, on Columbia Street, being not more than three fourths the actual value of said property, as appears by the application for this insurance, lodged with the secretary of this company.

The rules and regulations referred to are to be taken as of the contract in the same manner as if they had been introduced into the body of the policy; and are to be construed either as representations of stipulations and agreements, according to their nature and intent. They differ from the representations relating to marine risks, which representations are the statements or basis upon which the contract is founded, and are not treated as a part of the contract itself. As the owner of a vessel and cargo is generally in a position to know the character, value, and situation of the property to be insured much better than the underwriters, his representations are received and acted upon as true; and if afterwards they turn out to be false in some matter or thing material to the risk, then, in consequence of such misrepresentations, the contract is avoided, although the statement was made in ignorance or through mistake, and not from a fraudulent design. But in fire policies a different practice prevails, and the representations, so far as they are distinctly referred to in the policy, become parts of the contract, and are to be construed with it. *Houghton v. Manufacturers' Mutual Fire Insurance Co.* 8 Met. 114.¹

As to these defendants, it is one of their regulations, art.

¹ *Ante*, p. 346.

14, that not more than three fourths of the value of any building shall be insured by this company. This is agreeable to the provision of the Rev. Sts. c. 37, § 28, on the subject of mutual fire insurance companies, which is, that they may insure for a term not exceeding seven years, upon any building within this state, any amount not to exceed three fourths of the value thereof. This is a wise and salutary provision, and serves alike for the protection of the stockholders and the individual insured. The design is to prevent frauds by making it an object with the owner to guard his property from exposure to fire and to preserve it from destruction when the calamity comes; and by this increased security to induce honest persons, who are men of property, to become members of such companies, and who will be able and willing to contribute in the event of loss.

In the contract now under consideration, the value of the building insured is not stated in the policy, and we are to resort to the application, for the purpose of ascertaining that value. It will not answer to take the sum insured as furnishing the evidence of the value of the property by adding one third to it; because if this would be sufficient, the valuation would become a matter of form only, and the contract would in fact be regulated, not by the value of the property, but by the sum insured; a species of insurance which it was not the intent of the legislature to countenance, when granting such acts of incorporation.

On referring to the application, the value of the building is agreed to be four thousand dollars, and the plaintiffs now ask liberty to show that it was worth a much larger sum at the time of the insurance. But such evidence is inadmissible, and the valuation, if made in good faith, is binding on both parties. The converse of this proposition has arisen in two cases upon fire policies, and in them it is distinctly settled that the companies were concluded on the question of over-valuation, the same not being fraudulent. *Borden v. Hingham Mutual Fire Insurance Company*, 18 Pick. 523; *Fuller v. Boston Mutual Fire Insurance Company*, 4 Met. 206. If then underwriters are precluded from going into evidence to show an over-valuation, when no fraud is alleged, owners must in like manner be concluded, when the property is undervalued.

Statement of Value. — Mistake.

The value being at four thousand dollars, the contract does not, by law, cover more than three fourths of that sum; for it is admitted, and very properly, that the words "and the fixtures in the same" do not constitute the subject of a separate insurance. The fixtures are a part of the building itself, and are included in the estimates of its value. They are like the term appurtenances when applied to the insurance on a vessel.

In looking at the application we are strongly inclined to the opinion that the plaintiffs intended to insure three thousand dollars on the building, and five hundred dollars on the furniture and other movables; but the policy is express as to the subject of the insurance, and we cannot change the contract and make one for the parties, and apply the insurance to chattels not insured because the plaintiffs intended to insure them. *Higginson v. Dall*, 13 Mass. 96; *Wiggin v. Boardman*, 14 Mass. 12; *Ewen v. Washington Ins. Co.* 16 Pick. 502; *Miller v. Travers*, 8 Bing. 244.

It is said that the proposals were filled out by the agent of the defendants, and so the company are bound either to admit parol evidence of the alleged mistake, or to alter the policy in conformity to the application. The person who made out the property was at least as much the agent of the plaintiffs as of the company, in doing this act; but however viewed, it cannot affect the contract as it exists, nor open the door for the admission of parol evidence to alter its provisions. In what manner a court of equity would treat an application to amend a policy, we are not called upon here to decide.

Besides, the policy was delivered to the plaintiffs, and they must be presumed to have examined it at the time they received it, to have known what it contained, and to have understood its import. But they slept over it nearly four years, without requesting any alteration therein, until the loss happened, when the rights and liabilities of the respective parties were fixed, and the directors might not feel authorized to alter the terms of the policy.

The plaintiffs, having received three fourth parts in value of the building, as insured and valued by the terms of the contract, the nonsuit must stand.

See *Hare v. Barstow*, 8 Jur. 928, ante, 5 Rawle, 342 (1835); *Franklin Ins. Co.* 234; *Molere v. Pennsylvania Fire Ins. Co.* v. *Drake*, 2 B. Mon. 47, ante, 98.

W. & D. RHINEHART vs. THE ALLEGHANY COUNTY MUTUAL INSURANCE COMPANY.¹ In error.

(Supreme Court, Pennsylvania, September Term, 1845.)

Mutual Insurance. — Deposit Notes. — Rights of Insured.

The deposit notes of a mutual insurance company are part of its capital, and the directors are bound to call in a sufficient amount on them to pay the insured, who are losers by fire.

Where a loss by fire takes the entire funds of the company, the losers have an immediate vested interest in the effects of the corporation. If the notes are insufficient to pay all the losers, then the whole amount of the notes and effects of the company, together with one per cent. on the amount of the property insured and destroyed, must be called in by the directors, and divided *pro rata* amongst them.

AN amicable action of debt was entered, in which the defendant in error was the plaintiff below; and a case stated in the nature of a special verdict, for the opinion of the district court of Alleghany county, from which it came up on a writ of error. It was as follows:—

The plaintiff is an incorporated company, deriving its charter under an act of the legislature of this state, passed the 4th day of April, A. D. 1844 (prout the said act), made a part of this case.

The said company were duly organized within a short period after its creation, and proceeded to issue policies of insurance, in conformity with the provisions of said act, to about four hundred and seventy-five applicants, and for an amount exceeding the sum of \$1,100,000.

The defendants on the 5th day of April, A. D. 1845, became members of said company, by effecting an insurance therein for the term of five years from that date upon their machinery and stock in trade, as tobacconists, in the sum of \$2,500, upon deposit of their promissory note (payable to the said company or its treasurer, in such portions, and at such times, as the directors thereof might, agreeably to their act of incorporation, require) for the sum of \$200, being the amount determined by said directors; and upon the payment of five per cent. of the said amount thereupon, in conformity with the charter and by-

¹ 1 Barr, 359.

laws of the said company. On the 10th day of April, 1845, a fire occurred in the city of Pittsburgh, which resulted in the destruction of property insured by said company to the amount of \$72,000, and upwards (as ascertained by the directors thereof), and exceeding in value the whole amount of the premium notes and other resources of the company, together with the additional sum of one dollar on every one hundred dollars insured by them, at the time of said fire or afterwards.

On the 15th of the same month of April, the directors of the said company, at a special meeting convened in reference to that calamity, and with a view to the losses sustained thereby, directed a call upon the members thereof for the sum of twenty per cent. on the amount of the premium notes by them respectively given, payable in thirty days thereafter to the treasurer of the company, of which notice was duly given, in pursuance of the act of assembly and by-laws of said company.

Afterwards, to wit, on the 9th of June, 1845, the directors of the company, having been duly notified of the losses sustained by the members thereof, by the said fire of the 10th of April, upon property insured therein, and having duly ascertained the same, and moreover that the whole of the deposit notes and other resources of said company would not be sufficient to pay said losses, did, in conformity with the terms of their charter assess on the members thereof the whole amount of the unpaid balance of their respective notes; and in addition thereto, the sum of one dollar on every hundred dollars by them respectively insured, to be paid to the treasurer of the company on or before the 10th of July then next ensuing, whereof due public notice was also given in the manner prescribed by the charter and by-laws of the company.

The defendants paid the amount of the first, or twenty per cent. assessment, but denying their liability under the subsequent call, refused to pay either the balance of their deposit note, or the one per cent. additional, assessed and required as aforesaid, and this suit is brought for the recovery thereof.

The court were of opinion that the plaintiff was entitled to recover the whole unpaid balances of the deposit note of the defendants, together with the additional sum of one per cent. on the amount of their insurance in the company, and accord-

ingly rendered judgment on the special verdict for the plaintiff, which the defendants now assign for error here.

Dunlop, for plaintiffs in error.

Williams, contra.

The opinion of the court was delivered by

BURNSIDE, J. Mutual insurance companies are of modern growth. Their leading principle is, that each person whose property is insured becomes a corporator, and a member of the company. The act incorporating the Alleghany County Mutual Insurance Company binds every member of the company to pay his deposit note, when it is required to pay the loss occasioned by fire.

The deposit notes are the capital of the company. If the notes are insufficient, the losers receive a *pro rata* dividend of the whole amount of the notes and effects of the company, and an additional assessment not exceeding one dollar on every hundred insured. When a fire occurs which takes the whole funds of the company, the losers have an immediate vested interest in the funds of the corporation, to the extent of their loss. Where a loss is within the insurance, the charter binds them to pay to the full extent of their ability. The plaintiffs in error, by their by-laws, made insurances for five years. After the distressing fire in the city of Pittsburgh of the 10th of April, 1845, they made a call of twenty per cent. on their premium notes, and contend that this is as much as they are bound to call in, in any one year. In this way they desire to apportion their effects, so as to have a fifth of their capital to meet any loss which may happen to them that year. This construction would be contrary to justice and the express provisions of their charter. The directors of the company are bound to call in an amount equal to the loss. If the loss exceeds the effects of the company, they are to be paid *pro rata*. The corporators were bound to know the terms on which they were insured. The safety of a mutual insurance company is, to be careful in not insuring much property at any one point. The more their insurances are scattered, the better for the company. The corporation has no defence in the case stated.

Judgment affirmed.

Misrepresentation. — Ownership. — Over-valuation.

CATRON vs. THE TENNESSEE MARINE AND FIRE INSURANCE
COMPANY.¹

(Supreme Court, Tennessee, December Term, 1845.)

Misrepresentation. — Ownership. — Over-valuation.

A description of the property to be insured as if the applicant were the sole owner, when in fact he is only a tenant in common, avoids the policy.

A gross over-valuation, as representing the property worth \$12,000, when it was worth only \$8,000, avoids the policy.

THIS is a bill which was filed in the chancery court at Franklin, by Catron against the Tennessee Marine and Fire Insurance Company and George F. Napier. It was tried by Chancellor Cahal, on bill, answer, replication, and proof. He dismissed the bill and complainant appealed.

Meigs, for complainant.

Fogg, for the insurance company.

TURLEY, J., delivered the opinion of the court. Some time in the month of December, 1838, Geo. F. Napier, one of the defendants, made a written proposal for a policy of insurance to the Tennessee Marine and Fire Insurance Company, which is in the words and figures following, viz. : —

“ I wish a furnace and forge insured, viz. : the furnace is situated in Lawrence county, Chief’s Creek, stock composed of brick and rock ; one bridge-house, one bellows-house, one coal-house, one potting-house, one metal-house, all of wood, twelve thousand dollars. Amount wished five thousand dollars.

“ Forge, situated in Lawrence county, Chief’s Creek, two miles below the furnace ; one large forge-house, 40 feet square ; one bellows-house, 25 feet square ; one tempering-cupola, 3 fore-bays, and three water-wheels and fixtures, ten thousand dollars, amount wished five thousand dollars.

“ Buffalo Iron Works.

GEO. F. NAPIER.”

The company accepted of the terms proposed, and on the 17th day of December granted a policy of insurance upon the premises against a loss by fire, to the amount of ten thousand

¹ 6 Humphreys, 176.

dollars, viz.: five thousand on the furnace and its fixtures, and five thousand on the forge and its fixtures. The furnace and all its fixtures, except the coal-house, were in a short time after the effectuation of the policy, to wit, on the night of the 21st and 22d of December, 1838, destroyed by fire, and thereupon Napier proceeded to take such steps as seemed to him proper to make his contract of insurance effectual against the company, but the company, under the circumstances of the case, refused the indemnity.

John Catron, claiming to be a creditor of the said Geo. F. Napier, on the 21st day of May, 1841, filed this, his bill of complaint, in the chancery court at Franklin, against Geo. F. Napier and the Tennessee Marine and Fire Insurance Company, alleging the fact of such indebtedness to him on the part of said Napier; that he had removed himself out of the jurisdiction of the state, and the fact that the Tennessee Marine and Fire Insurance Company was indebted to him by virtue of the policy of insurance, in the sum of five thousand dollars, and prays that it be attached in his hands, and appropriated by a decree of the court to the payment of his debt.

A decree of this character is resisted by the company upon several grounds:—

1st. It is contended, that there is no proof in the record showing that John Catron, the complainant, is a creditor of defendant, George F. Napier.

We have no doubt that in point of fact, out of the record, the indebtedness does exist; but it would be difficult to establish its existence by any proof in the record; most certainly the amount of such indebtedness cannot be so established; but we do not think that an investigation and determination of this question is at all material for the determination of this case, as we are well satisfied, that upon other points made, it must be decided against the complainant, and in favor of the insurance company; and therefore have not deemed it necessary to inquire minutely whether there is any sufficient proof of the indebtedness charged in the bill.

2d. It is contended, that George F. Napier, at the time the policy of insurance was effected, was the owner of only one half of the premises insured; which fact he did not disclose to

the company at the time, and that this neglect, whether fraudulent or innocent, vitiates the policy.

The facts material for the consideration of this point are: George F. Napier and Felix Catron bought, as joint tenants, the premises insured from John Catron, the complainant, who conveyed to them by deed in fee simple, under which they entered in possession, they having continued for a considerable time in the use and occupation of the Iron Works. Felix Catron proposed in writing to sell his interest therein, upon specified terms, to George F. Napier, to which he replied, that he would take his interest upon the terms proposed, supposing the debts of the establishment, which by the terms he was to pay, did not amount to more than twelve thousand dollars.

Nothing further appears to have been done by the parties to effectuate this arrangement; no conveyances were ever made; Napier never complied with any of the terms of the proposition on his part; it does not appear whether the debts due were more or less than twelve thousand dollars. Felix Catron continued to reside at the works up to the time of the destruction of the furnace by fire; and appears to have been greatly agitated and distressed at the happening of that event, and much more so, indeed, than George F. Napier himself.

All these facts are totally inconsistent with the idea that a sale had been made by Felix Catron of his moiety of the premises.

We are constrained to say, that the proposition to sell, which was made and accepted upon the terms stated, was never carried into execution, for some reason which does not appear of record, but most probably, either because Napier could not, or would not comply with the terms thereof, or because the debts, upon being ascertained, amounted to more than twelve thousand dollars. This being so, George F. Napier was the owner only of one undivided moiety of the premises insured. This fact was not communicated to the insurance company, and he effected, as we have seen, an insurance upon the whole estate in his own name, and for his own benefit. Now, does this vitiate the insurance? We think it does. If the insurance company had been informed by Napier that he was only the owner of one half, they surely would not have permitted him to effect an

insurance on more than that half; they might not have insured at all. For Napier being the owner of only one half of the property insured, he had in the first place only one half as much interest in protecting it from destruction by fire as he would have had otherwise.

In the second place, being the owner of only one half, and having insured for the whole in his own name, and for his own benefit, he had much higher temptation to apply the brand with his own hand.

And in the third place, had the corporation known that Felix Catron was the owner of the one half, they might not have chosen to risk upon his care and diligence, in securing the property from loss.

In the case of *Williams v. Smith*, 2 Caines' Rep. 13, Livingston, J., delivering the opinion of the court, says: "It is essential to the validity of every contract of this kind, viz., Insurance, that an account be given to the underwriters of every material fact, which enhances the risk. This account, in other words, should be exact and complete, because the insurer computes his risk by it. If, therefore, any circumstances be suppressed or concealed which the insured knows to exist, and which if declared would entitle the other party to demand a higher premium, the contract is void; for every intentional concealment of circumstances which vary the risk, is regarded as a fraud.

"But it is not only a fraudulent concealment, or misrepresentation, that will vitiate a policy. If a misrepresentation be made from oversight, or with the utmost good faith, and without any design to impose, still if it be a material fact, and not true, there is an end of the policy.

"There is no reason why the same rule should not apply to unintentional concealment, nor ought it to form any excuse, that the assured knew nothing of the fact concealed. He is supposed, and ought to know everything material that relates to the subject of insurance, and is to be presumed to be in a situation to lay before the underwriters every matter necessary to form a just estimate of the risk he is about to assume. The property is his, and by a moderate degree of attention he might obtain every necessary information respecting it. If he does not, he must be deemed guilty of negligence, for which he alone

ought to suffer. If neither of the parties knew of a circumstance which subsequent events have discovered to be important, the contract is founded in mutual error, in which case the parties cannot be said to have assented to it. If the assured had known the circumstances he would not have effected an insurance at all, or would have declared it to the underwriters, who would have declined the risk altogether, or have asked an increase of premium."

This principle, the judge adds, accords with those laid down and illustrated by Mr. Millar in his *Law of Insurance*: "Every instance of misrepresentation and concealment," says this learned author, "however unintentional, if it varies the risk undertaken in the minutest particular from that understood, destroys the consent of parties, and annuls the contract."

It implies not only mistakes, but mistakes founded in fault; "*culpa lata*," say the civilians, "*æquo paratur dolo*."

In the case of *Smith v. Williams*, 2 Caines' Cases, 110, Lansing, Chancellor, who delivered the opinion, says: "The insurer is a perfect stranger to the subject insured; whatever relates to it must be considered as particularly resting in the knowledge of the assured, and the law imposes it on him to acquire a competent information respecting it.

"This is a salutary and well established rule. For how is it possible to determine, with unerring certainty, the exact state of intelligence he possessed? or what portion of the ignorance he possesses, is to be attributed to his want of exertion, or to his wish of concealment of latent defects which may affect his interest?"

"If he does not possess full knowledge of every circumstance respecting it, involving the interest of others, it may be his misfortune, but it must be legally imputed to him as a fault."

In the case of the *Columbian Insurance Company v. Lawrence*, 2 Peters' Rep. 25, Lawrence and Poindexter, in the offer made for the insurance, described the property as belonging to them, without any qualifying terms which would lead the mind to suspect that their title was not complete and absolute. The title of the assured was subject to contingencies, and was held under contracts which had become void by the non-performance of the same. Mr. Chief Justice Marshall, who delivered the

opinion of the court, in commenting upon this branch of the case, says: "The assured have not proved such an interest as is described in the original offer for insurance. The contract for insurance is one in which the underwriters generally act on the representation of the assured, and that representation ought consequently to be fair, and to omit nothing which is material for the underwriters to know. It may not be necessary that the person requiring insurance should state every incumbrance on his property, which it might be required of him to state if it was offered for sale; but fair dealing requires that he should state everything which might influence, and would probably influence the mind of the underwriter in forming or declining the contract. A building held under a lease for years, about to expire, might be generally spoken of as the building of the tenant; but no underwriter would be willing to insure it as if it was his; and an offer for insurance, stating it to belong to him, would be a gross imposition."

"Generally speaking, insurances against fire are made in the confidence that the assured will use all the precautions to avoid the calamity insured against which would be suggested by his interest. The extent of this interest must always influence the underwriter in taking or rejecting the risk, and in estimating the premium. So far as it may influence him in these respects, it ought to be communicated to him. Underwriters do not rely so much upon the principle as on the interest of the assured, and it would seem, then, to be always material that they should know how far this interest is engaged in guarding the property from loss. Marshall, in treating on insurance against fire, p. 789, b. 4, ch. 2, says:—

"It is not necessary, however, in order to constitute an insurable interest, that the assured shall in every instance have the absolute and unqualified property of the effects insured.

"A trustee, a mortgagee, a reversioner, a factor or agent, with the custody of goods to be sold upon commission may insure; but with this caution, that the nature of the property be distinctly specified."

"In all the treatises on insurance, and in all the cases in which the question has arisen, the principle is, that a misrepresentation which is material to the risk avoids the policy.

“In this case the circuit court has decided that there is no misrepresentation; that the interest of the assured was truly described in the offer for insurance; and consequently no question as to the materiality of the supposed variance was submitted to the jury. As this court is of opinion that a precarious title depending for its continuance on events which might or might not happen, is not such a title as is described in the offer for insurance, construing the words of that offer as they are to be fairly understood, the circuit court has in this respect misdirected the jury.”

This case came up again for consideration, and is again reported in 10 Peters, 507. Mr. Justice Story, in delivering the opinion of the court, reaffirms the doctrine as it had been previously laid down by Mr. Marshall. He says: “The next question which arises is whether there has been in the proposal for insurance a misrepresentation of the interest of the assured in the property insured, and if there has been, whether, if that representation is material to the risk and would have enhanced the premium, it avoided the policy.

“The proposal for insurance describes the property and interest thus: ‘What premium will you take to insure the following property belonging to Lawrence and Poindexter for one year, against loss or damage by fire, on their stone-mill, four stories high, covered with wood, situate,’ &c. It was decided by the court in the former case reported in 2 Peters’ Rep. 47, that the real interest existing in Lawrence and Poindexter, at the time of the proposal, was not such as is described therein. It was further decided by the court in the same case, that a misrepresentation of the interest of the assured, which is material to the risk, would avoid the policy.

“We think the reasoning of that case upon this point entirely satisfactory, and founded in the true exposition of the contract of insurance. Whenever the nature of this interest would have or might have a real influence upon the underwriter, either not to underwrite at all, or not to underwrite except at a higher premium, it must be deemed material to the risk, and if so, the misrepresentation or concealment will avoid a policy.”

These authorities are decisive of the question, and establish beyond a doubt, that if the insured at the time of his insur-

ance represents his interest in the property to be greater than it is, the policy is void, and this whether the misrepresentation be the result of ignorance or design.

The case of *Strong v. Manufacturing Insurance Company*, 10 Pickering, 40, if it were at variance with these cases, could not influence our judgments against them, but upon scrutiny it will be found not to be so much at variance, if at all, as at first might be supposed. The same general principles of law are certainly laid down in it, and if there be a variance, it is only in the application of those principles to the case then under consideration.

Wilde, J., who delivered the opinion, says: "But the principal objection on which the defendant's counsel rely, is, that the plaintiff did not make a full and fair representation of his interest, and that there was such concealment as vitiated the policy.

"Undoubtedly the plaintiff was bound to make a full and fair exposition of all the facts and circumstances relating to the condition and value of the property insured, and to disclose his interest therein as far as was material to the risk. But we do not perceive how the incumbrances on the plaintiff's property could be considered as material to the risk; the destruction of the house did not extinguish the mortgage debts, so that he was interested in the full amount of the value of the property insured. It was not necessary to specify in the policy that the property was under mortgage."

Now it is obvious that the court in this case, after establishing the same general principles as the cases we have referred to, only excluded the case then under consideration from their operation, because it held that the interest of the assured was coextensive with the estate insured, and that he had as great inducements to protect it from loss as if it had not been mortgaged, the burning of the house still leaving the mortgage debt unpaid.

Now, in all other cases it was held that the interest of the assured was not coextensive with the estate insured, and that there were not as high inducements to protect the property from loss.

Such is this case: the Iron Works insured are represented by

Geo. F. Napier as belonging to him, when he was only the owner of one half thereof; his interest was not coextensive with the estate, and in consequence of this misrepresentation the insurance company have been misled as to the amount of care which his interest would recommend him to take in the preservation of the property. Upon principle and authority then the policy of insurance is void, and cannot be enforced against the corporation.

Here we might rest this case, but there are two grounds of defence relied upon by the corporation, which we deem it proper to notice: these are, that the policy is also avoided by reason of over-valuation of the furnace with its fixtures, which, as we have seen, was estimated at \$12,000 by the assured, and that the policy was obtained in fraud by Napier, with a view to its destruction, in order to charge the insurance office. We have no doubt from the proof that the property was grossly overvalued, having been estimated at some \$4,000 more than it was really worth. This of itself would avoid the policy; for although it is true that slight over-estimates, such as a man might in the valuation of his property honestly make, would not vitiate a policy of insurance, yet it is equally true that an over-estimate such as shocks the sense, and shows that it could not have been made but by design, will. This, an over-estimate of one third, surely is. As to the fraudulent intent of the assured, in procuring the policy with a design of destroying the property himself, without undertaking to assert the fact to be so, we are constrained to say that there is too much reason for believing that he did, and that he carried the nefarious design into execution.

What are the facts from which our inference is made not improbable? During the whole period of time in which the furnace was in blast it was not insured; the reason assigned for this is a lame and impotent one, that is, that the assured could not get the money to pay the premium. It must be obvious that there was more necessity for insuring at that time than after, when it was not in operation; and it is difficult to conceive that the owner of iron works, such as these are described to have been, could not at any time raise an amount sufficient to pay the premium of insurance upon \$10,000.

The furnace had been out of operation six months before the time of insurance. George F. Napier had become insolvent, and was making arrangements to remove himself and property South; he had sent off a portion of his property in that direction, and, as we unhesitatingly believe, was preparing to follow it in a very short time, as he actually did. He could then have no intention of working the furnace again, but his design obviously was to abandon it, having never paid any consideration for it, and never intending to do it. Why then insure? But the most startling fact, perhaps, in connection with this subject is, that the furnace should have stood six months after it went out of blast, uninhabited, and that George F. Napier's personal enemies who were vindictive enough to destroy his property by fire, should have been so kind and considerate as to postpone the execution of their design till he could go to Nashville, effect an insurance thereon, and immediately thereafter, directly upon his return, should perpetrate the act. The insurance was made in Nashville on the 17th December, 1838, and the furnace was burnt in Lawrence county, on the 28th day of the same month. In addition to all this, his behavior on the occasion, as described by the witness, was chuckling congratulation; while his partner was very much cast down by the misfortune, he was felicitating himself upon the event; that it was a fortunate thing he had insured, as he said to some, while to others he pretended that he did not know certainly whether he was insured or not, that he had written to a Mr. Gould at Nashville to have it done.

Yet all these things may be true, and the man not guilty of the crime, but such are the suspicions raised by them, that it would be with great difficulty, if at all, that we could have given a decree against the insurance company, if this had been the only objection against it.

We therefore, upon the whole view of the case, affirm the decree of the chancellor dismissing the bill.

See *Delahay v. Memphis Ins. Co.* 8 Fire Insurance, 277-280; *Wilbur v. Bow-Humph.* 684, *post*, and note; Flanders on *ditch Mut. Ins. Co.* 10 Cush. 446 (1852).

Warranty.

JENNINGS vs. THE CHENANGO COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1846.)

Warranty.

The doctrine that a general warranty on the sale of property does not extend to defects which are obvious to the senses, does not apply to the case of warranties in policies of insurance.

A policy of insurance, after describing the nature of the risk in general terms, added, "Reference being had to the application of said H. J. for a more particular description, and the conditions annexed, as forming a part of this policy." Held, that this clause made the conditions and application parts of the contract, and thereby rendered the statements in the application warranties; so that anything therein short of literal accuracy would avoid the policy.

THE case is stated in the opinion.

B. D. Noxon, for the plaintiff.

D. Wright, for the defendants.

By the Court, JEWETT, J. The first question made on the argument was, whether it was competent for the plaintiff to prove that at the time the application was made for this policy, the agent for the defendant was informed that there was a turning lathe and work-bench in the mill. On the trial such evidence was admitted, though objected to in behalf of the defendants. The ground of the objection is, that the evidence offered was to contradict the written contract between the parties, and it is insisted that parol evidence for such purposes could not be admitted. On the other hand, it is argued that this is no contradiction of the terms of the contract, but only the same thing in effect as though it were proved that the agent examined the mill and saw the lathe and work bench, in which case it is contended that, although the application fails correctly to represent for what the mill was occupied, yet that the warranty would not extend to such things which were obvious to the sense. The contract between the parties is the policy, conditions, and application, which are in writing. 6 Cowen, 576; 6 Wendell, 488; 1 Phil. on Ins. 27; 13 Wendell, 92, affirmed on error, 16 Id. 481. The application shows that the plaintiff applied for the insurance of a certain sum on his grist-mill.

¹ 2 Denio, 75.

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One of the conditions, which are part of the contract, requires the application to be in writing, and among other things to set forth for what the building was then occupied; and another is that the insured in all cases will be bound by the application.

The counsel for the plaintiff, to sustain his proposition, referred to several authorities relating to the effect of a warranty of soundness or against defects made on the sale of property. The proposition that the general warranty on the sale of property does not extend to defects which are obvious to the sense, is undoubtedly correct, even when the contract is in writing. In *Schuyler v. Russ*, 2 Caines, 202, the action was upon a written warranty of soundness, and that court held that parol evidence was admissible to show that at the time of the sale the vendor informed the vendee of the defect in question, and also that it was clearly visible. The court cited Finch's Law, 189; 1 Salk. 211; to which may be added, Long on Sales, 2d ed. 202, and the cases there cited. Although it may be difficult to assign a satisfactory reason for a distinction in this respect between a warranty in a policy of insurance and one upon a sale of property, there are yet many adjudged cases sustaining the principle, that where the policy on its face is clear and explicit, no parol evidence *aliunde* can be admitted, to contradict, control, restrain, or extend it. *Vandervoort v. The Columbian Insurance Co.* 2 Caines, 155; *Cheriot v. Barker*, 2 John. 346. In *Higginson v. Dall*, 13 Mass. R. 96, C. J. Parker, in giving the opinion of the court, said, that policies, though not under seal, have nevertheless ever been deemed instruments of a solemn nature, and subject to most of the rules of evidence which govern in the case of specialties. The policy is itself considered to be the contract between the parties, and whatever proposals are made or conversations had, prior to the subscription, they are to be considered as waived, if not inserted in the policy or contained in a memorandum annexed to it.

Nor are words spoken by the parties at the time of signing the policy to be taken as a part of the contract; as where the underwriter, at the time of signing, said he would not be held if a vessel did not sail by a certain day. The court said: "The declaration of the underwriters, that unless the vessel should sail by a certain day he would not be bound, should have made

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a part of the written contract, if he intended to avail himself of it. Parol evidence is not sufficient to give it effect." *Whitney v. Haven*, 13 Mass. R. 172. In *Weston v. Emes*, 1 Taunt. 115, it was decided that parol evidence of what passed at the time of effecting an insurance was not admissible to restrain the effect of a policy. In *Atherton v. Brown*, 14 Mass. R. 152, where property was insured on board the Spanish brig "Constitution," the vessel was captured, and with her cargo was condemned as American property; it was held that the description in the policy amounted to a warranty that the vessel was Spanish, and that it was not competent for the assured to show that the underwriters were informed, at the time of their subscription, that she was in truth an American vessel, and was to be ostensibly Spanish for the purpose of avoiding capture by the enemy. Parol evidence of what was within the knowledge of the underwriters was not admissible. In *Parks v. General Int. Insurance Co.* 5 Pick. 34, the court said: "Generally, no doubt, the terms of the policy are to be taken as the evidence of the contract; and they are explicit: all proposals made, or conversations had, before the subscription, inconsistent therewith, are to be considered as waived, according to a well known rule of construction of written contracts." In *Wiggin v. Boardman*, 14 Mass. R. 12, Parker, C. J. said, that no instance can be found, where the knowledge of the underwriter that a deviation was intended, has been set up in excuse for such deviation, or to avoid the effects of it. Such a fact could only be proved by evidence extrinsic to the policy, and in fact contradictory to the terms of it; so that by the rules of evidence, which are said to apply as strictly to these contracts as to deeds, no such facts could be inquired into. If the insured means to protect himself in any adventure, which does not fall within the usual provision of a policy, or within the known usage of the voyage he insures, he should insist upon a stipulation which will accommodate his views, and not trust to evidence which the law will allow to vary the bargain, which is proved by the writing.

In *Flinn v. Tobin*, Mood. & Malk. 367, Lord Tenterden, C. J., said that the contract between the parties is the policy, which is in writing, and cannot be varied by parol. No defence therefore which turns on showing that the contract was

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different from that contained in the policy, can be admitted; and this is the effect of any defence turning on the mere fact of misrepresentation without fraud.

One essential difference between a representation and a warranty is, that the former is of some matter out of and collateral to the contract and making no part of it, while the latter is of some matter appearing on its face. Evidence of a representation is never received to explain the intention of the parties to the contract, but merely for the purpose of establishing a fraud. *Vandervoort v. Smith*, already referred to. In *De Hahn v. Hartly* 1 T. R. 343, Lord Mansfield, C. J., said: "There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered; but a warranty must be strictly complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but being inserted, the contract does not exist unless it be literally complied with." Ashhurst, J., said: "The very meaning of a warranty is to preclude all question whether it has been substantially complied with; it must literally be so." See also *The Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. 481. And it is a matter of no moment whether the warranty is material or not as regards the risk; it must be complied with before the assured can sustain an action against the underwriters. *The Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72.

A false warranty will vitiate the policy, though the loss happens in a mode not affected by the falsity. *Woolmer v. Mulman*, 1 W. Black. 427; 3 Burr. 1419. Not so as to a representation. To avoid the policy it must be false or mistaken in a matter material to the risk, and that is a question for the jury. *The Farmers' Ins. & Loan Co. v. Snyder*, 16 Wend. 481, in error. The rule that the express provision of the policy cannot be varied by proof of any representation, is applicable to *fire policies* as well as marine ones. *N. Y. Gas Light Co. v. Mechanics' Fire Ins. Co.* 2 Hall's Rep. 108; Phillips on Insurance, 284. And a *condition* in a fire, no less than a marine policy, not complied with, defeats the policy, whether it be material to the risk or not, and whether the non-compliance be with or without the

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act or privity of the assured. 1 Phillips on Insurance, 410, ch. 9, § 10; *Duncan v. Sun Fire Ins. Co.* 6 Wend. 488; *Fowler v. Etna Ins. Co.* 7 Id. 270.

The question then recurs, Do the application and conditions annexed to the policy in this case make part of it? for if not, then, without doubt, the plaintiff under the evidence was clearly entitled to recover. If the application is to be regarded merely as a representation, there is no evidence that it was either false or inaccurate in a matter material to the risk.

I take it to be an admitted principle in the law of insurance as well as in the law operating upon other contracts, that separate papers may, by express stipulation, be made part of the contract. 13 Wend. 92. The policy in question recites that Harvey Jennings, the plaintiff, was a member of the Chenango Mutual Insurance Company, and bound and obliged himself, &c., and also secured the company the sum of \$200.10, the amount of the deposit or premium for insuring the sum of \$1,334 unto him on the following property, viz., \$1,334 on his grist-mill. Reference being had to the application of said Harvey Jennings for a more particular description, and the conditions annexed as forming a part of the policy. This stipulation, it seems to me, makes the conditions annexed to it and the application as much a part of the policy as if they had been written on its face; and such facts therefore as are stated in the application must be regarded as having all the effect which an express warranty inserted in the body of the policy would have.

If I am not mistaken in this, I think it would be difficult for any one to see any legal reason why the principle that the non-compliance with an express warranty on the part of the assured avoids the policy should not be applied in all its strictness in this case. The warranty then not having been strictly complied with, there is no contract. One of the conditions is that the application shall state where the property is situated and *for what occupied; its relative situation as to other buildings; distance from each if less than ten rods; for what purpose occupied, &c.* Another condition is, that such applications may be made either by the applicant or by a surveyor; and in *all cases the insured will be bound by the application.* A still further condition declares that if any person insuring any property in this

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company shall make any *misrepresentations or concealment* in the application; or if after the insurance is effected the risk of the property shall be increased, &c., such insurance shall be void and of no effect. The application represents the building insured as a *grist-mill*, without any other designation of the purpose for which it is occupied; and its relative situation as to other buildings is thus stated: "This mill is bounded by space on all sides."

I do not think the representation as to the purpose for which the mill was occupied is falsified by the fact that a work-bench and tools were kept in the mill for the purpose of keeping it in repair. I have no doubt but that the plaintiff might, without incurring the danger of forfeiting his policy, place in the mill suitable materials and tools to make and keep up the ordinary repairs of the building. *Dobson v. Sotheby*, Mood. & Malk. 90. But here other mechanical operations were carried on by the turning lathe and work-bench than to repair the mill.

As it respects the location of the mill in reference to other buildings, the application contains a clear misrepresentation, which I think renders the policy void upon the well settled principles to which I have adverted. At the same time it cannot be denied but that their application to this case operates with great severity upon the plaintiff, and is well calculated to lead to a serious doubt, whether the intentions of the parties and the interests of justice were duly regarded in the establishment of the rule that matters of mere description should, in this class of contracts, be considered an express warranty, without regard to their materiality in respect to the risk. Here the mistake is proved to have been the consequence either of the ignorance, carelessness, or bad faith of the agent of the defendants. He filled up a printed blank application furnished by the defendants to be subscribed by the plaintiff, who probably neither had or pretended to have any information or knowledge of what such paper ought to contain in order to render the policy available, but relied in that respect implicitly upon the agent sent out by the defendants.

Having, however, come to the conclusion that the law of the case is as above stated, I am bound to say that the decision of the learned circuit judge was erroneous, and that a new trial

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must be had upon that point. It is unnecessary therefore to examine the other points in the case. The costs must abide the event.

New trial granted.

 BROUGH vs. HIGGINS *et al.*¹

(Court of Appeals, Virginia, January Term, 1846.)

Life Estate. — Reversion. — Repair of Building.

A building insured, in which one person is entitled to a life estate and another to the reversion, sustains a partial injury from fire. *Held*, that the tenant for life is entitled to have the amount due from the insurance office applied to the repair of the building. The owner of the reversion is also entitled to have the insurance money applied to the repair of the building.

ROBERT BROUGH, being the fee simple owner of a wooden tenement in the borough of Norfolk, caused it to be insured by the Mutual Assurance Society against fire on buildings in the state of Virginia. The building so insured was, after his death, allotted to his widow, Mrs. Brough, on account of her dower, and the reversionary interest afterwards became vested in Eugene Higgins. In this state of the trial the building was revalued, under the rules and regulations of the Mutual Assurance Society, which provided for periodical revaluations of insured buildings; and on the revaluation Higgins, as Mrs. Brough says, with her knowledge, took a policy in his own name on the building, subject to Mrs. Brough's life estate therein; though she, thereafter, paid some, and was considered responsible for a reasonable part of the annually accruing quotas to the society. Under these circumstances the building was partially injured by fire, for which injury the society was confessedly responsible. The estimated value of the building was about \$2,500, the injury it sustained from the fire was estimated at about \$530, and the responsibility of the society therefor about \$425.

The injury to the building was repaired by Mrs. Brough, at a cost exceeding the indemnity for which the society was responsible, and that injury, unless repaired, exposed the building to great dilapidations, if not total destruction.

¹ 2 Gratt. 408.

Mrs. Brough, having repaired the building, brought this suit, in the superior court for the borough of Norfolk, against Higgins and the Mutual Assurance Society, to recover the amount payable by the society. By the decree of the court below, the sum payable by the society is decreed to be paid to her, on condition that she gives bond with approved security to Higgins in a penalty equal to double the amount received of the society, conditioned to pay over the amount received by her, upon the termination of the life estate; and the parties are directed to pay their own costs. From this decree Mrs. Brough obtained an appeal to this court.

Light, for the appellant, submitted the case.

There was no counsel for the appellees.

STANARD, J., after stating the case, proceeded: The fact that on the revaluation of the building Higgins took out a policy in his own name, may, I think, be at once dismissed from the case, as that fact ought not, in any manner, to affect the interest of the tenant for life in the then existing insurance. Stripped of that fact, the case for decision is that of a building insured, in which one is entitled to the life estate and another to the reversion, sustaining a partial injury from fire, for which indemnity is due from the insurers, and the injury repaired by the tenant for life at a cost exceeding the amount of the indemnity. And the question is, what are the rights of the tenant for life and the reversioner respectively in this indemnity?

In the case of *Haxall's Executors v. Shippen*, 10 Leigh, 536, the court decided, and that decision is in my opinion a governing authority, that where the title in an insured building is in a tenant for life and a reversioner, and the building is entirely destroyed, the property is in effect converted to personalty, and the parties have the like interest in the insurance money that they had in the building; that is, the tenant for life is entitled to the use of it for life, and the reversioner to the principal at the death of the tenant for life. And that the tenant for life cannot, by applying the money to the rebuilding of the house, defeat the reversioner's title to have the money on the termination of the life estate; nor has the reversioner a right to require the tenant for life to apply the money to the rebuilding of the house.

This decision has been applied by the court below to the case now in judgment, and if the cases be not distinguishable, the decree of the court below must be affirmed.

To my perception, the distinction between the cases is not only visible, but broad and well defined.

In the case of a total destruction or approaching it, the conversion of the interest in the building into the personal demand for the insurance, is complete. Nothing, or little, remains to be preserved, and in such case it is at least problematical whether the interests of either the tenant for life or reversioner would be promoted by devoting the insurance money to the rebuilding of the house; and each of these parties ought to have a voice in the solving of the problem, on which disinterested men of sound judgments may have opposing opinions not dictated by mischievous caprice. And though much rebuilding may be to the advantage of one, it may at least not have the approbation of the other. Such approbation might be withheld, without referring such dissent to the reckless purpose of the self-infliction of injury to cause damage to another. Now, in the case of a partial injury, such as that sustained in this case, where the building was worth \$2,500, and the injury was \$530, and the indemnity therefor was \$425, there was four fifths of the building to be preserved by the reparation, without which that four fifths was exposed to great dilapidation, and to ultimate ruin or destruction. To the tenant the value of the building was greatly impaired, and the reversioner was exposed to the total loss, if dilapidation should not be prevented by repairs. No rational mind could hesitate to say that it was for the benefit of both that \$425 should be expended, to save from ruin or destruction a building worth \$2,500. The obvious and demonstrable interests of both were, that such repairs should be made; and if the choice had been presented to the tenant, to apply the indemnity from the insurance to the reparation of the building, or to use the money and let the building go to waste without repair, or to the reversioner, to leave the building without repair and take the insurance money at the death of the tenant for life, the choice of both, unless that choice was dictated by some irrational perversity, meriting the most unqualified condemnation, would concur in the application of the indemnity from the in-

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insurance to the reparation of the building. By such reparation, the tenant for life has the use of a building worth \$2,500 instead of the use of money to the amount of \$425; and the reversioner has the building at the death of the tenant for life instead of \$425 in money, and during the life of the tenant for life, has a continuing insurance at a valuation of \$2,500, on which, should the building be destroyed by fire, he would be entitled at the death of the tenant for life, instead of the \$425, to the principal of the amount insured, about \$2,000. Between such alternatives, nothing but the most irrational and condemnable perversity would hesitate a choice.

The relations between the tenant for life and reversioner, as they affect the question involved in this case, may be considered under two aspects. By the strict common law rule, supposing there had been no insurance, the tenant is bound to repair, and as the statute of Anne has not been incorporated in our Code, the tenant may be bound to repair the partial injuries from fire, at least so far as to prevent dilapidations to which such injury may expose the building. Under this aspect of the case, which devolves on the tenant the duty to make such repairs, the injuries to be repaired are exclusively his risks; and it seems to be a plain consequence of reason and justice, that the indemnity stipulated for such injuries should enure to him who is bound to repair them. He who suffers the loss should have the indemnity, the claim to which arises solely from the loss. Otherwise the consequence would be, that he who sustained the whole loss would be bereft of the greater part of the indemnity; and that greater part would enure to him who is already fully indemnified, and has suffered no loss. Had an action of covenant been brought on the policy, which was the proper legal remedy, would not the claim of the tenant cover the whole of the indemnity? The injury had been repaired by the tenant at an expense exceeding the insurance money. To the extent of the sum payable by the insurance company, and more, the tenant had been injured. On what principle could she have been denied any part of this inadequate indemnity? Then suppose the action is by the reversioner, and the fact appears that all the injury was repaired, and more than repaired, what damage has he sustained for which he could recover anything? And what

pretext, in reason and justice, is there for withholding a portion of the inadequate indemnity from the tenant, who alone has suffered by the accident, to supply a fund to be recovered by him who has sustained no loss?

In the other aspect of the case, presented by the assumption that the tenant is not bound to repair, the argument has, in a great degree, been anticipated. The law to fix and define the right of the parties is not to be sought in artificial or technical doctrines, but is the result of the application of the general principles of justice and convenience; giving predominating influence to those that tend to preserve rather than destroy, and to discountenance and repress reckless and mischievous caprice. The reason of the case gives the law, and that reason would forbid the self-inflicted loss, irrationally incurred, to cause an equal or greater loss to another; as would be the case were the tenant on the one hand, or the reversioner on the other, invested with the absolute power to deny the application of the indemnity from the insurance to the reparation of the partial injury, and doom the injured building, so much more valuable than the partial indemnity, to dilapidation and ruin, or destruction. The rule in such a case, to give effect to the conservative spirit of the law, and prescribed by sound reason, equal justice, and public interest, is, that when such partial injury is caused by fire to an insured building, the title to which is in a tenant for life, or for other limited interest, and a reversioner, the insurance covering the entire fee, it is the right of each, or either of them, to have the indemnity resulting from the insurance applied to the reparation of the building; and as far as so applied, the interests of the parties in the insurance is absorbed, and is represented by the repaired building, as if to the extent of the repairs no injury had been sustained.

The other judges concurred in Stanard's opinion.

The decree was as follows: —

The court is of the opinion, that the decree is erroneous; and so much of the decree of the court below as subjects the appellant to liability to the appellee Higgins, at the termination of her life estate, for the principal of the sum she may receive from the insurance society; and suspends the decree in her favor against the said insurance society until she shall give bond and

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approved security to Higgins, conditioned to pay him the sum she may so receive from the said insurance society, when her life estate shall terminate; and decrees that the parties respectively should pay their own costs, be reversed and annulled, and the residue of the said decree be affirmed: and that the appellee Higgins pay to the appellant the costs by her expended in the prosecution of her appeal in this court; and also the costs by her expended in the prosecution of her suit in said circuit superior court.

JEREMIAH CARPENTER, appellant, *vs.* THE PROVIDENCE WASHINGTON INSURANCE COMPANY.¹

(Supreme Court, United States, January Term, 1846.)

Practice. — Evidence.

It was required by the terms of a fire insurance policy, that notice of any subsequent insurance should be given, and that the same should be indorsed or otherwise acknowledged in writing. It had been decided in a suit at law that the policy was avoided by non-compliance with these terms.² A suit in equity being now brought, it was *held*, that the sworn answer of the president of the company, denying that notice had been given of the subsequent insurance, required the production of more than one witness on the part of the complainant to overturn the same, notwithstanding the fact that the president was not in office when the alleged transaction took place. It was also *held*, that the proof produced by the complainant was not sufficient to make out his case.

THE case is stated in the opinion.

Whipple & Wood, for the appellant.

R. W. Greene & Sergeant, for the appellee.

WOODBURY, J., delivered the opinion of the court.

This was a bill in equity on a policy of insurance made by the defendants. The original policy, executed September 27, 1835, for one year, and annually renewed till September, 1838, contained the following clauses: "And provided further, that in case insured shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if the said insured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable

¹ 4 How. 185.

² *Ante*, p. 120.

diligence, give notice thereof to this corporation, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no further effect." A loss having occurred on the 9th of April, 1839, an action at law was instituted to recover the amount of the defendants, on which final judgment was rendered in their favor in this court, at the January term, 1842. See *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495.¹ This was chiefly on the ground that another policy had been effected on the same property at another insurance office, in December, 1836, and renewed yearly till December, 1838, but which had not been "mentioned in or indorsed on this policy, or otherwise acknowledged by them (the defendants) in writing."

For various other particulars connected with the case, reference can be had to the above case, and the statement which precedes this opinion.² Under these circumstances, the complainant next resorted to the bill now in consideration, and alleged, that "in the month of December, A. D. 1836, and in the month of December, A. D. 1837, and at divers other times, the said Providence Washington Insurance Company had notice from the said H. M. Wheeler & Co. of the said insurance at the office of said American Insurance Company in Providence, and said notices, so given for the purpose of having the same indorsed on the policy at the office of said Providence Washington Insurance Company, or otherwise acknowledged by them in writing. And your orator supposed that the said Providence Washington Insurance Company had performed their part of said contract in this behalf, as in equity and good conscience they were bound to do."

He then added: "Wherefore, inasmuch as your orator is remediless at and by the strict rules of the common law, he prays your honors to issue a decree compelling said Providence Washington Insurance Company to indorse said notice on said policy, or otherwise acknowledge the same in writing according to the terms of their policy, as they long since ought to have done, and to compel said Providence Washington Insurance Company to pay your orator said sum of \$15,000, with interest from the time of said loss, and his costs."

¹ *Ante*, p. 120.

² See 4 How. 185-195.

The defendants, in their answer, deny that they ever had notice in any form of the additional insurance, or not till long after the execution of the policy now in question, and object to the admission of any evidence on the subject, except such as is in writing according to the stipulation in the policy itself. And they further deny, that the plaintiff has any equity to compel these defendants to indorse a notice of such previous or subsequent insurance on said policy, or to acknowledge the same in writing.

They then aver, that if the additional policy had been communicated to them, and the present insurance still continued, it would have been void, because false representations, material to the risk in respect to the value of the whole property, were made, affecting the additional policy, and that the probability is the present one would not have been continued on seeing the additional policy, as that is for \$6,000, and the present one \$15,000, making an aggregate insurance of \$21,000, when, in the original statement to the defendants, the whole property was valued at only \$19,000; and when it is not the custom of insurance companies to take risks on this kind of property beyond three fourths of its value, in order to keep the insured still interested to the extent of the other fourth, and thus likely to use greater precaution against fire, and lessen the risk of the insurers, compared with what it would be if an additional insurance was obtained covering the whole value.

It will be seen by this state of the case, that important questions, both of fact and law, are involved in it: of fact, whether the additional policy was ever made known to the defendants for the purpose of being acknowledged in writing; and of law, whether, in that event, it was their duty so to have acknowledged it, and not doing so, whether this court can now compel them to do it. There are other considerations which arise in the course of the inquiry that will receive attention, but are incidental rather than raised directly through the pleadings. The testimony in support of the leading allegation in the bill is not very complicated. But how much of evidence should be required to prove that allegation, under the principles applicable to the circumstances of this case, is one of some difficulty, and is first to be settled. Where an answer is responsive to a

bill, and, like this, denies a fact unequivocally and under oath, it must in most cases be proved not only by the testimony of one witness, so as to neutralize that denial and oath, but by some additional evidence, in order to turn the scales for the plaintiff. *Daniel v. Mitchell*, 1 Story, 188; *Higbie v. Hopkins*, 1 Wash. C. C. R. 230; *The Union Bank of Georgetown v. Geary*, 5 Pet. 99. The additional evidence must be a second witness or very strong circumstances. 1 Wash. C. C. R. 230; *Hughes v. Blake*, 1 Mason's C. C. R. 515; 1 Gill & Johns. 425; 1 Paige, 239; 3 Wend. 532; 2 Johns. Ch. R. 92. *Clark's Executors v. Van Riemsdyk*, 9 Cranch, 153, says, with pregnant circumstances. *Neale v. Hagthorp*, 3 Bland's Ch. 567; 2 Gill & Johns. 208.

But a part of the cases on this subject introduce some qualifications or limitations to the ground rule, which are urged as diminishing the quantity of evidence necessary here. Thus in 9 Cranch, 160, the grounds of the rule are explained, and it is thought proper there that something should be detracted from the weight given to an answer, if from the nature of things the respondent could not know the truth of the matter sworn to. So if the answer do not deny the allegation, but only express ignorance of the fact, it has been adjudged that one positive witness to it may suffice. 1 J. J. Marshall, 178. So if the answer be evasive or equivocal. 4 J. J. Marshall, 213; 1 Dana, 174; 4 Bibb. 358. Or if it do not in some way deny what is alleged. *Knickerbacker v. Harris*, 1 Paige, 212. But if the answer, as here, explicitly denies the material allegation, and the respondent, though not personally conusant to all the particulars, swears to his disbelief in the allegations, and assigns reasons for it, complainant has in several instances been required to sustain his allegation by more than the testimony of one witness. 3 Mason's C. C. R. 294. In *Coale v. Chase*, 1 Bland, 136, such an answer and oath by an administrator was held to be sufficient to dissolve an injunction for matters alleged against his testator. So is it sufficient for that purpose if a corporation deny the allegation under seal, though without oath, *Haight v. Morris Aqueduct*, 4 Wash. C. C. R. 601; and an administrator denying it under oath, founded on his disbelief, from information communicated to him, will throw the burden of proof on the plaintiffs beyond the testimony of one

witness, though not so much beyond as if he swore to matters within his personal knowledge. 3 Bland's Ch. 567, note; 1 Gill & Johns. 270; *Pennington v. Gittings*, 2 Gill & Johns. 208. But what seems to go further than is necessary for this case, it has been adjudged in *Salmon v. Clagett*, 3 Bland, 141, 165, that the answer of a corporation, if called for by a bill, and it is responsive to the call, though made by a corporation aggregate, under its seal, without oath, is competent evidence, and cannot be overturned by the testimony of one witness alone. We do not go to this extent, but see no reason why such an answer by a corporation, under its seal and sworn to by the proper officer, with some means of knowledge on the subject, should not generally impose an obligation on the complainant to prove the fact by more than one witness. 5 Pet. 111; 4 Wash. C. C. R. 601. Here the denial by the corporation is explicit and responsive to the bill, and its truth sworn to by its president, according to the best of his knowledge and belief. The only difficulty is in respect to the extent of that knowledge. He was not the president of the company at the time the information of the second insurance is alleged to have been given. Nor is it relied on in argument, that he was then a member and lived near, or was for any reason likely to be consulted when such notice were received. But he has since had access to all the files and records in his official capacity, so as to know if any letter on this subject appears to have been received, and therefore testifies with some means of knowledge. And though it is admitted that the certainty is not so great against the reception of the notice as if Jackson himself was alive, and testified against it, yet in the nature of the case and by the precedents, the denial is strongly enough made and supported to impose on the complainant the proof of his allegation by something more than the testimony of one witness, though not so much more, it is conceded, as the "pregnant circumstances" before alluded to.

The next inquiry is, whether the material allegation in this case is thus proved? On an examination of the evidence, it will be found that not even one witness swears positively to it, and whatever is sworn in support of it is much impaired by other proof. The allegation, it will be remembered, is, that in

December, 1836, and divers other times, the defendants had notice from the insured of the second insurance, given for the purpose of being indorsed on the policy, or acknowledged in writing.

There is no attempt to prove any such notice except on two occasions, one in 1836 and one in 1837. The only witness called to support the first is Mr. Wheeler. He testifies that about the time of the second insurance in December, 1836, he wrote a letter to the president of the Providence Washington Company, stating that such an insurance had been effected, and thinks he put the letter in the post-office. This is all on that point in behalf of the complainant concerning this notice.

It is to be observed that the testimony of Wheeler, in its full extent, does not prove the fact that information of the second insurance ever actually reached the defendants for the purpose of being indorsed or acknowledged, but merely that a letter was written for that purpose, and probably put in the post-office.

Though such evidence, standing alone in the case of notice of non-payment of bills of exchange and promissory notes, is sufficient, under mercantile usage, to raise a presumption that the holder had used due diligence, yet even in such cases it is not held to prove the actual receipt of notice. *The Bank of Columbia v. Lawrence*, 1 Pet. 582, and *Dickins v. Beal*, 10 Pet. 581. Much less can it prove the receipt of it, where no such usage exists as in the case of policies of insurance.

When we look for any other proof to sustain or strengthen Wheeler's evidence, thus defective, it will appear to be weakened rather than strengthened by the other testimony and circumstances, because first, such letter, if ever received, would probably be preserved on the files of the office. So would it probably be answered, as that was not only the usage in respect to all letters on official business, but it is shown, specially, to have been the custom of the office to act forthwith and officially on letters like these when received, and to send a reply in conformity to the decision of the company upon them. Yet no answer is stated ever to have been received concerning this; nor is any trace of an answer, or of the original, found in the office either in the recollection of other officers, or in any files, books, records, or even memoranda.

Again: the insured, if conscious that such a letter had been sent, and reached its destination without being answered, would naturally have written or called to ascertain why information of the second insurance was not acknowledged in writing, apprised as the insured must be, both by the published terms of insurance and the policy itself, that the latter was void and ceased to operate without such an acknowledgment, and that it was the duty and interest of the insured to see to this acknowledgment being made. Nor is it a sufficient answer to the last objection that he might rest quiet without a reply, supposing the acknowledgment had been indorsed on the policy, because the policy was in the possession of the insured and not of the insurers; and hence it is well known to the insured that no such indorsement had been made on that.

It is difficult, likewise, to discover any adequate motive for not replying to the letter, if it was ever received, unless it be one resting on a gross fraud. If the company, or its president, on a receipt of it should not choose to continue the policy, as would probably be the case, for reasons before mentioned, they would feel no reluctance to state the fact to the insured, and thus end a risk where the insurance exceeded the value of the property, and differed so much from their usual prudent terms of underwriting. But if they did choose to continue it, they would be likely soon to reply, stating that fact, because without such a reply, they knew the insured would probably consider the policy terminated, in conformity with the stipulations in it, and would insure elsewhere, and they lose a premium which they had decided it was expedient for the company to retain.

This is all which it is considered necessary to say in respect to the evidence of the notice supposed by the plaintiff to have been given by Wheeler in 1836.

But it is urged, besides this, that another notice of the additional insurance at the Providence American Company was given the ensuing year, in December, 1837, through Mr. Peck. It is manifest, however, that this last notice, like the other, must stand or fall by itself, as they are distinct or disconnected in time and circumstances, not parts of one transaction, and are attempted to be sustained by testimony not cumulative but entirely different. What is proved on this matter by

Mr. Peck? Merely that a letter, written to him for another purpose contained a statement of the existence of the second insurance, and his impression that he showed the letter to the president of this company for the other purpose. It will be seen that his testimony is rather argumentative from his usual habits of business, than positive, that he showed the letter at all to the president; but if he did, it is conceded that the object was to communicate merely the other fact, the change of owners in the property; see Wheeler's letter. And if he carried the letter in his hands, which contained other matters, mentioning an insurance at the American Office, he was not desired, as appears by the letter itself, to communicate that part of it, nor does he say, in his written reply, that he had communicated that part, but only notified the Providence Washington Insurance Company, that Mr. Wheeler had disposed of his interest to you, of which they had made record.

Besides this, and against any such notice having been given or intended for the purpose set up in this bill, there are most of the collateral considerations which have been enumerated in opposition to the other notice, alleged to have been given the previous year.

It must also be recollected, that a letter was written to the president by Wheeler on the same day he wrote to Peck, saying nothing in it concerning any second insurance; and the president promptly answered it, saying nothing in reply concerning that subject, but all which was expected as to the other. On this, it will occur immediately to ask if Peck had given such notice, or been requested to do it, or even if Wheeler had before given it, why Wheeler did not at once write again, stating that an answer had been received as to the notice of a change of property, but none as to the second insurance. In short, a convincing proof that nothing was communicated but the change of owners in the property is, that nothing more seems intended to have been communicated; that nothing more was contained in the letter to the president, and nothing more wished to be stated by Peck, and no witness testifies that the other information was actually read by, or named to, the president, and no collateral fact renders the last circumstance probable. This is the whole evidence in the case,

on this point, that is essential. To show more fully that under it none of the material questions of law arise or can be considered, which might otherwise be presented, it may not be unimportant to discriminate and examine briefly what those questions are, and what must be proved in order to resist them.

Several precedents exist, where respondents in equity are allowed, by way of defence, to prove by parol that the written contract relied on does not contain all the original terms agreed, and in this way entitle themselves to be exonerated under the terms proved by parol. *Woollam v. Hearn*, 7 Ves. 211; 2 Story's Eq. Jurisp. § 770; and Sugden on Vendors, 125 to 140 and cases cited. Others exist, of this kind of proof being at times permitted to complainants, in relation to separate subsequent terms of agreement modifying the prior ones, and on those subsequent terms being proved by parol, a recovery be allowed. 4 Bro. Ch. R. 514; 1 Ib. 92. There are other precedents of complainants seeking to show by parol a portion of a contract existing when the original was made, but which was omitted from it by accident, and against doing which some of the authorities seem to decide. 7 Ves. Jr. 211, 15; Ib. 518; Story's Eq. Jurisp. § 770, and note. On the contrary some decide for it. 2 Ves. Sr. 375; 1 Ib. 456; 1 Starkie on Ev. 1015, 1018. But neither of these classes of cases can be claimed as embracing this. Here the parol proof is offered by a complainant, rather than by way of defence; and it is not pretended that any omission has happened of a part of the original contract, or that there has been any new separate contract modifying that.

On the contrary, in the most natural aspect of the case, it is one of a complainant attempting to show, by parol, a fact, which if true is supposed to establish a neglect or wrong in the defendants, a breach of official duty happening some time after the contract of insurance was made, by not acknowledging then in writing the receipt of information that another policy had been obtained on the property, and saying in reply, under these new circumstances, that the first contract should either continue or terminate.

This presents, it will be seen, a question somewhat novel, namely, whether the specific performance of a duty in private life, not of a contract, can be enforced by courts of equity, and

a party compelled, by a sort of *mandamus*, to acknowledge in writing what he had never promised so to acknowledge.

The question, however, need not now be decided, as such a duty is not claimed to exist except where a notice of the second insurance is actually received. And to prove such a receipt here, the evidence offered is certainly insufficient, whether requiring only one positive witness, unimpaired, or something more than one.

But there is another aspect of the case, which would present a different question of law, if it was set out specially in the bill and was supported by any stronger proof as to the material fact. It is that the respondent should be considered as barred or estopped from setting up the want of an acknowledgment in writing, if that want was the result of his own neglect of duty. In that view, both the receipt of the information, and a consequent obligation to make an acknowledgment of it in writing, must be satisfactorily established before any neglect of duty can be imputed. But as already shown, the first fact, the receipt of the information, is not established in that manner; and, if it were, some difficulty might exist as to the second point, in considering a mere omission to reply as a wrong, and such a wrong as to estop the insurers from making an objection expressly provided for and allowed in the policy. Because it is not the insurer, but the insured, on whom the obligation seems to be imposed to have the notice of the further insurance reduced to writing, as a condition precedent to a recovery. It is the insured who by that further insurance increases the risk of the former insurers, and who ought, therefore, to have it both communicated and acknowledged in the manner stipulated, in order to render it sure that a continuance of the first risk is assented to. And though an omission to answer a letter from the insured might incommode him, and be a breach of comity, it is not easy to discover any engagement or promise which it violates.

Supposing, however, the bill to be broad enough in its allegations, and the sending of notice of the second insurance proved, and the duty to acknowledge it, if received, to be clear, we might, in most cases like this, enforce a discovery of the receipt of it, if coming to hand; and might enjoin the insurers

against using, by way of defence, a circumstance caused by their own misconduct. *Baker v. Biddle*, 1 Bald. C. C. R. 405. But whether we could go further, and enforce a recovery for the loss on the equity side of this court, when an action had been brought for it on the law side and failed, and other reasons there may still exist for any wrong done, is a question open to doubt, and need not, for the reason before stated, be now decided. *Le Guen v. Gouverneur*, 1 Johns. Cas. 436; *Simpson v. Hart*, 1 Johns. Ch. R. 91; *Gordon v. Hobart*, 2 Sumner's C. C. R. 401.

Finally, it is urged, that a fraud has been perpetrated here, and that fraud constitutes at all times a distinct and sufficient ground for a recovery in chancery. The fraud, if existing here, would not be in failing to answer the receipt of information of the second policy, stating frankly, as convenience and a spirit of courtesy required, whether the original insurance would be continued longer or not; but in omitting to give full explanations on the subject when the insured applied for a renewal of the policy, and in proceeding then to take a further premium, with a covert design to defeat the insurance on account of the second policy, provided any loss should happen.

The rule of equity is very broad to prevent a fraud, which would exist if one was permitted to derive a benefit from his own breach of duty and obligation. 2 Story's Eq. Jurisp. § 781. And it has been laid down, that if by fraud or misrepresentation one prevents acts from being done, equity treats the case as if it were done. 1 Ib. § 439; 11 Ves. 638.

In the bill there is an averment of fraud, and, at the close, a general prayer for any suitable relief; and it seems plausible that we might, if satisfied of the existence of fraud, estop the party guilty of it from profiting through his own wrong, by preventing him from setting up, as a defence, the want of an acknowledgment in writing, when such want was the result or the instrument of his own misbehavior. But there is still a difficulty in this view of the case, from the circumstance that redress has been and still is open to the plaintiff, at law, for any fraud; and the judiciary act provides, that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy

may be had at law. Act of September 28, 1789, § 16; 1 Story, 59. And also from another reason, which has affected the previous points, — a want of satisfactory evidence of the facts alleged. The first step in proving a fraud fails. Neither a neglect nor wrong is shown by the positive testimony of any one witness; and whatever is sworn to by any one in behalf of the complainant is counteracted by opposing circumstances, rather than strengthened, as it should be after a sworn denial in the bill, and in so grave a charge as fraud, by very satisfactory auxiliaries, though not perhaps by so strong evidence as is necessary in reforming contracts; that is by evidence which is irrefragable, and not open to opposing presumptions. 1 Bro. Ch. 347; 2 Cranch, 419; 1 Ves. Sr. 317; 6 Ves. 332; 8 Wheat. 211; 1 Pet. 13; 2 Johns. Ch. 595, 630.

It is a matter of regret that so great a loss, which the plaintiff and others under whom he claims intended to guard against by insurance, should happen entirely without indemnity. But it is to be remembered, that the defendants gave abundant and repeated notice to him in writing and print in the policy itself, as well as other ways, that they would not take any risks on property where it was insured beyond a certain ratio of its full value, unless the circumstances were made known to them, and the additional policy recognized in writing, so as to avoid any mistake, or accident, or want of deliberate attention to the subject.

If the plaintiff, after all this, omitted to comply with so substantial a provision in the contract itself, as we are bound to believe on the evidence now offered, we see no way, equitably or legally, to prevent the consequences from falling on himself, rather than others, being the result either of his own neglect or that of some of the agents he employed.

An adherence to such important rules is peculiarly necessary for the protection of absent stockholders, often interested extensively in insurance companies; and so far from its being unconscientious to enforce them, when their existence is well known, and when the risk has been increased without conforming to them, it is the only and just safeguard of all concerned in such institutions.

Let the judgment below be affirmed.

TANEY, C. J., being sick, did not sit in this cause.

THE STATE OF OHIO, on relation of John A. Corwin, *vs.*
THE URBANA AND CHAMPAIGN MUTUAL INSURANCE COM-
PANY.¹

(Supreme Court, Ohio, January Term, 1846.)

Rate of Interest. — Banking. — Non-user.

Where an insurance company is by its charter authorized to lend money, without restriction as to the rate of interest, it does not work a forfeiture of its charter to receive more than six per centum; and when, by the terms of its charter, it is allowed to lend upon "such terms" as the directors may deem expedient, extra interest beyond six per centum can be collected by law.

It is no violation of a charter, which contains a clause prohibiting the exercise of banking powers, to receive money on deposit.

An insurance company does not forfeit its charter because of non-user by refusing to insure against extra hazardous risks.

THIS is an information in the nature of a *quo warranto*, received from the county of Champaign.

In the information filed in this case, it is averred, the defendant, being a corporation, has and still does misuse the liberties, privileges, and franchises conferred upon it by the act which gave it birth, in making loans of money at usurious rates of interest, to wit, at *twelve per centum per annum*; in the employment of its capital in the purchase of notes, bonds, and other securities, at enormous rates of discount, varying from *fifteen* to *forty per centum*, and in other moneyed transactions, contrary to the spirit of the act of incorporation, and against law, to the great damage and prejudice of the state and the good people thereof.

In a second count, the relator charges the defendant with having forfeited the franchises conferred by non-user, in this, that from the 1st day of January, 1833, up to the 24th of January, 1842, the time of filing the information, the defendant ceased and refused to insure property from loss by fire or otherwise, such insurance being the sole object of its creation, in total disregard of the provisions of the act, &c.

In a third count it is averred that the defendant, from the 1st day of March, 1841, used and still does use, without any warrant, charter, or grant, the liberties, privileges, and franchises of

¹ 14 Ohio, 6.

becoming the proprietor of a bank or fund for the purpose of receiving deposits, making discounts, and transacting other business, which incorporated banks in the state of Ohio may do by virtue of incorporation; and also, that the defendant actually receives deposits, gives certificates of deposit, makes discounts, and carries on banking operations and other moneyed transactions which are usually performed by incorporated banks, and all which liberties, privileges, and franchises the defendant did, and still does, usurp upon the state of Ohio. To the great damage, &c.

The defendant pleaded, or more properly answered, separately to each count. To the first, that by its charter, the company was authorized to loan any part of its capital stock, moneys, funds, or other property to individuals or corporations, on real or personal security, for such periods of time and upon such terms as the directors of such company should deem expedient; and that by virtue of said act of incorporation and the laws of the land, the said loans were made.

To the second count, that the defendant had not ceased to insure property against fire or otherwise, but had always been ready and willing to make such insurance at reasonable rates.

To the third count, that they had received deposits of money and other valuable things, but had not received such deposits and given out certificates as a bank, or done any banking business. This is disclaimed and denied.

At the June term, 1842, those issues were submitted to a jury in the supreme court for Champaign county, who found that the defendant had loaned money paid into said company for stock or otherwise, at twelve per cent. per annum, since July, 1835, and from that period back to January of the same year at ten per cent., and had purchased bonds, notes, and other securities, at an average rate of sixteen per cent. since July, 1835; that the means of the company paid in, amounting to about sixty thousand dollars, have been thus chiefly used by the company.

The jury further found there was but one insurance then existing on fire; and one risk, and that one risk on a steam saw-mill, was declined in consequence of extra hazard; that the defendant had taken but *two* insurances on fire since 1833, but had always been ready and willing to take such risks.

It was likewise found that the defendant had dealt as a savings bank or institution, receiving small deposits from many persons, from children and others, to the amount of some three hundred dollars in all up to the commencement of this prosecution; but had received no deposits from merchants or traders. That the funds of the defendant fell on dividend days, and *once or twice*, reduced the amount of money below the capital stock of the defendant on hand.

On this "finding of the jury," the prosecution moved for judgment of ouster, which was resisted by the defendant; and this is the question reserved for the consideration of this court.

Samuel H. Robinson & D. S. Bell, for relator.

John H. James, for defendant.

WOOD, C. J. The counsel for the prosecution insist that the state is entitled to judgment on this verdict, as a matter of course, on the first count in the information, *because the facts are found by the jury substantially as they are averred*. In most cases which occur, such a position could not well be successfully answered; for the *allegata* should, and usually do when traversed and found to be true, constitute a good basis for a legal judgment. If such, however, be not the case, in civil actions even, the judgment will be arrested; and in favor of a defendant as strict rules, at least, should be applied, in what may be termed a *quasi criminal prosecution*.

On this count, it will be seen, no facts are found by the jury but what are *expressly* admitted by the plea. The issue, therefore, is upon the application of the law, and needed not the intervention of a jury.

But do the facts, admitted or found, constitute a *measure* of the privileges of this corporation? To determine this, it is necessary to look to the act by which it was created, and still continued to exist. The 4th sec. V. 29 Lo. Laws, p. 175, provides that it shall be lawful for said company to invest any part of its capital stock, money, funds, or other property, in any public stocks or funds, debt created, or to be created by any law of this state; and the same to sell and transfer at pleasure, and again to invest the same, or any part thereof, in such stocks or funds, or otherwise, whenever and so often as said company may deem it expedient; or may loan the same or part thereof

to individuals or corporations, on real or personal security, for such period of time, and upon *such terms* and under such restrictions as the directors of said company for the time being shall deem most expedient: *Provided*, That it shall not be lawful for said corporation to engage in the business of banking; nor shall said company make, issue, or emit any bills of credit, as a circulating medium for trade or exchange; and *provided also*, that the capital stock of said company shall not exceed fifty thousand dollars.

It is not a question for us whether the powers conferred by this section are the results of wise or unwise legislation. The privileges and franchises granted are extensive in the extreme, and but feebly guarded from misapplication and abuse; and it should have been foreseen by the legislature which conferred these extraordinary powers, that corporations, like individuals, would sometimes apply their means to the acquisition of gains beyond which the ordinary sense of mankind would consider strictly justifiable or purely moral.

But had this defendant the power to loan money at twelve *per cent. per annum*, and to purchase bonds, notes, and other securities at sixteen per cent. discount, as found by the jury?

The charter is the law of the case. If none of its provisions have been violated, it is difficult to find any legitimate ground to demand its surrender. The defendant, not by implication or inference, but by express grant, may invest any part of the capital stock *in stocks or funds, or otherwise*, whenever and so often as is deemed expedient. *Otherwise*, would seem to indicate, *in any other lawful manner*. It may therefore invest in bonds and notes and by discounting them; and, as the company is restricted, *to no rate of discount*, it is by no means a violation of its charter if it make a good bargain. By the charter, it may loan money to individuals or corporations, on real or personal security, for such period of time and upon *such terms* as the directors deem expedient. The rate of interest is not restricted. The charter then is not violated by the reception of twelve or fifty per cent. on the loans of this company. An individual may contract for any rate of interest under the general law; but the law will coerce the payment of six per cent. per annum, only; but the contract is no *violation of law*, because it

is not prohibited. An individual may, for the same reason, receive any rate of interest. It is no violation of law, and when paid it cannot be recovered back.

A corporation unrestrained, may occupy the same ground. The rate of interest demanded or received, though it may be so exorbitant as to shock the moral sense of the community, is no violation of its charter, unless restrained by it.

We incline to the opinion, however, that this charter confers the power to bargain for any rate of interest; and if so, any rate of interest agreed upon could be recovered by law.

The persons to whom loans may be made, are described; the kind of security and the period of time are provided for, and loans are to be upon "*such terms*" as the directors deem expedient. By the words "*upon such terms*," must probably mean to intend *such rate of interest*; for as the persons to whom loans may be made, the kind of security and length of time for which made, are all *enumerated*, it is difficult to imagine what else could have been designed by the words "*upon such terms*," unless to *fix the rate of interest by agreement*. But if such were not the object of this legislation, there is nothing averred in this first count which can be said to be legally a *misapplication, abuse, or misuse* of the franchises granted; and, consequently, no legal judgment of ouster can be predicated thereon, although such averments are found by the jury to be true.

The facts averred in the second count, are by no means found by the jury, in a legal sense at least, although insurance was evidently one of the objects of the company, and provided for in the 2d section of the act. The jury found one existing insurance, one refusal, because extra hazardous; but that the defendant was always ready and willing to insure at reasonable rates. The law by no means requires this defendant, *volens volens*, to insure property or forfeit its charter for non-user, but applications must be made and refused, at reasonable rates and without excuse.

The third count of the information, in substance, charges upon the defendant an usurpation of the franchise of banking, and specifies, with minuteness, the acts done and the usurpations relied upon, as within the proviso of the 4th section and violations of the charter.

The finding of the jury does not, however, appear to us to square exactly with the allegations in this count. The jury say the defendant has dealt as a savings bank or institution, receiving small deposits from children and others to the amount of some \$300 in all, but have received no deposits from merchants or traders; nor is it found a certificate of deposit was given by the company.

It does not appear to us this finding is within the prohibition against banking, and, if not, it is a lawful pursuit, in which a corporation as well as an individual may engage; and it is well said by the defendant, that although receiving deposits is a part of the business of banks, it is no *exclusive privilege of this*, nor is the discounting of notes.

All persons in Ohio, artificial as well as natural, may pursue the business of banking with the single exception of the issuing of notes for circulation as money. This is the mischief the legislature have sought from time to time to remedy; it is the only exclusive, and the principal franchise, except its life conferred upon a bank. It is against the issue and circulation of notes, *as currency*, that our penal statutes have, without exception, it is believed, been directed from 1816 to the present day. These deposits in savings institutions, however, have but little semblance to bank deposits. In general bank deposits, no interest is paid by the bank, and the money is repaid on demand. In savings banks, the deposits, though called such, are strictly loans, on which interest is paid, and are repaid only on express and specific notice.

We have, therefore, come to the conclusion that the finding of the jury on this count does not lay the foundation for judgment against the defendant, but that judgment on all the counts must be entered in his favor.

HEMAN SWIFT & STEPHEN PRATT vs. THE VERMONT MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Vermont, February Term, 1846.)

Insurable Interest. — Formal Defects.

An equitable estate in fee simple is as much an insurable interest in buildings, against fire, as an absolute legal estate in fee simple, whether at common law or within the act incorporating the Vermont Mutual Fire Insurance Company.

By the term less estate therein, in section ten of the act incorporating the Vermont Mutual Fire Insurance Company, is intended estates of *less duration* than estates in fee simple, as estates in fee tail, for life, for years, or at will.

A policy of insurance from said company is not avoided by any formal defects in the title deed of the assured, which might be corrected in a court of equity.

ASSUMPSIT upon a policy of insurance. The plaintiffs alleged in their declaration, that on the 10th day of June, 1837, one Alvah Hawks, being the owner in fee of a certain tavern house and other buildings in Woodford, which were subject to a mortgage to the plaintiff, Swift, for \$1,400, made application to the defendants for insurance on said buildings, and on certain property therein, for the benefit of both Hawks and Swift; that the defendants thereupon made and delivered their policy of insurance to Hawks and Swift, to continue in force from twelve o'clock at noon on the 10th day of June, 1837, until twelve o'clock at noon on the 10th day of June, 1843, by which they insured Hawks and Swift, on the said building and property, \$2,450, being the sum of \$1,200 on the tavern house, and the remainder upon the other property; that afterwards, on the 3d day of February, 1843, Hawks conveyed all his right, title, and interest in the buildings insured to the plaintiff, Pratt, and on the 20th day of February, 1843, assigned to Pratt the said policy of insurance; and that on the 27th day of March, 1843, the said assignment was duly ratified and confirmed by the directors of the company, pursuant to the act of incorporation and by-laws of the company. And the plaintiffs averred that on the 25th day of May, 1843, the said tavern house was consumed by fire, of which due notice was given to the defendants. The declaration also contained counts in *indebitatus assumpsit* for work

¹ 18 Vt. 305.

and labor, goods sold, &c., and the money counts. Plea, the general issue.

The parties agreed in the case that the insurance was effected and the loss happened in the manner stated in declaration, and that at the time of insurance, assignment, and loss, the parties insured were in possession of the property insured, supposing that they had a perfect title to the same. The application for insurance was signed by Hawks, and stated the property, in general terms, to be his, subject to a mortgage to Swift for \$1,400, which also covered six acres of land, and the application was for an insurance for the benefit of both. The policy was to Hawks and Swift, in the common form.

In regard to the title to the premises, the facts were conceded to be, that one Elisha Lyon, in the year 1831, entered into possession of the land on which the buildings insured were subsequently erected, under a verbal contract with the Bennington Iron Company, a private corporation, and that he erected thereon most of the buildings insured, and that the plaintiffs have all the title of Lyon; that that title depends upon the effect of a deed purporting to be the deed of the Bennington Iron Company, dated September 20, 1833, signed for the Bennington Iron Company, N. Leavenworth, and sealed and witnessed, but not acknowledged or recorded; that N. Leavenworth, who executed said deed, was the general agent of the iron company in the management of their ordinary business, and one of the directors; that, at the date of said deed, the iron company had a corporate seal, with a particular device, which was not used upon said deed; that the said company, since the execution of the deed, have made no claim to the land therein described, but the creditors of the company attached all their lands in the town of Woodford in February, 1842, but did not levy upon this land, and the lien created by their attachment expired after the commencement of this suit. Certain records of the Bennington Iron Company were also made part of the case stated, from which it appeared that at a meeting of said company, holden on the 22d of April, 1836, the report of a committee, showing the condition of the company's real estate, was accepted, a part of which, showing the real estate sold by the company, stated as sold from the Forge Lot six and a quarter acres, which

it was conceded was the land deeded to Lyon, as above stated. These records contained also a vote of the company passed at a meeting holden October 12, 1842, directing the president and secretary of the company to execute a general deed of confirmation of certain lands before that time sold and conveyed by deed by one Hammond, or by Leavenworth in behalf of the company; and among the tracts of land specified in said vote was the lot deeded to Lyon.

The act incorporating the defendants, and all subsequent statutes in relation thereto, and the by-laws of the defendants were also made part of the case stated. The sixth section of the act of incorporation was in these words: "That every member of said company shall be and hereby is bound and obliged to pay his portion of all losses and expenses happening or accruing in and to said company; and all buildings insured by and with said company, together with the right, title, and interest of the assured to the lands on which they stand, shall be pledged to said company, and the said company shall have a lien thereon against the assured, during the continuance of his, her, or their policies;" to which section was appended a proviso, which was subsequently repealed by statute of 1831. The tenth section of the act of incorporation was in these words: "That the said company may make insurance for any time, not exceeding ten years, and any policy of insurance issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said company in all cases, when the assured has a title in fee simple, unincumbered, to the building or buildings insured, and to the land covered by the same; but if the assured have a less estate therein, or if the premises be incumbered, the policy shall be void unless the true title of the assured and the incumbrance on the premises be expressed therein and in the application therefor."

It was also conceded that the plaintiffs, in October, 1843, paid to the defendants the sum of \$7.85, being the amount of an assessment upon the premium note, which was ordered to be paid October 18, 1843, and that the sum had never been refunded to the plaintiffs, the defendants being ignorant, at the time of the payment, of the defect in the plaintiff's title.

It was agreed by the parties, that judgment should be ren-

dered by the county court for the defendants with liberty to the plaintiffs to except; and judgment was accordingly so rendered. Exceptions by plaintiffs.

Hall & Lyman, for plaintiffs.

J. S. Robinson & Southworth, for defendants.

The opinion of the court was delivered by

REDFIELD, J. The only question in the present case is whether the plaintiffs' title was such that the policy is binding upon the defendants?

The only defect in the plaintiffs' title, here insisted upon, is in the deed from the Bennington Iron Company to Lyon. There is no doubt, I apprehend, that this deed, as a legal conveyance, is wholly defective. It would hardly be necessary to go into detail in pointing out its defects. It is not a deed under the seal of the corporation, nor by the president of the corporation, nor in pursuance of any vote of the corporation. It will hardly be contended, that a corporation can convey their land except in some of these modes. It is therefore not worth while to take time here to determine what is the proper mode of executing such a conveyance, as, in every view, this is manifestly defective as a formal conveyance of legal title.

But notwithstanding this, it is shown very clearly that this deed was executed by the general agent of the corporation, and that it was understood by him and by the grantee to convey a perfect title in fee simple; that the grantee since the date of the deed has continued to occupy the premises; that this occupancy has been fully acquiesced in by the corporation; and that they have received the full price of the land, and, by express vote, have ratified this with all other conveyances made by the same agent.

There can be no doubt, then, that the corporation would, in equity, be compelled to convey to the plaintiffs. They are the equitable owners of the land in fee simple. And all the authorities concur in the point, that an equitable title at common law is as much an insurable interest in buildings as a strictly legal title. The estate is but one, and it is indifferent whether the assurance is in the name of the legal or of the equitable owner; an insurance in the name of the trustee will enure for the benefit of his *cestui que trust*. All that is required is, that it be truly represented to the insurers. But to them it is unim-

Insurable Interest. — Formal Defects.

portant; the extent of the plaintiffs' interest is the same in both cases; so, too, the lien of the company will be as effectual upon this equitable as upon a legal estate; for they must at all events pursue it in equity, it being a right not capable of being enforced in courts of law.

We think it very clear, that the defect in the title does not avoid the policy, under the act of incorporation of the insurance company, which provides that all policies upon buildings, when the insurance is general, shall only be binding when the assured has an unincumbered title in fee simple, but that when he has any less estate therein the same shall be void. The incumbrance in this case was properly represented, and the assured in fact had no less estate in the premises than a fee simple, excepting the incumbrance. What is meant by less estate in the act is an estate of less duration, as an estate in fee tail, for life, or for years, or at will. We think, therefore, that the estate was a fee simple, within the just and reasonable interpretation of this act. *Judgment reversed and case remanded.*

NOTE BY REDFIELD, J. — I have not deemed it of much importance, in preparing the opinion in this case, to go into the general law of insurance, in order to determine what interests in buildings or goods are insurable. It seems to be well settled by the English cases, that policies, which were expressed to be made interest or no interest, were valid at common law; but policies which contained no such clause were construed to be an assurance upon an interest of the assured; and if it appeared that he had in fact no insurable interest in the thing, the policy was void at common law. The statute of 19 Geo. 2, c. 37, declared all wagering policies, that is, policies where the assured had no interest, void, and farther required the assured, in all actions upon a policy of insurance, to prove his interest by other testimony than the policy. And as we do not, in this state, allow validity to any wagering contracts (*Collamer v. Day*, 2 Vt. 144), we should not, of course, incline to view with much favor a wagering policy. No doubt in this state the law, in that respect, will require, that the assured should have an interest, both at the time of the insurance and the

loss, the same as under the English statute. But by referring to the English cases upon this subject, it will be seen that the courts there have been very liberal in maintaining policies, where the assured really had anything at hazard in the subject matter of the insurance, and it will be found, by an examination of the cases, that there this whole question of interest, which has been so much discussed in cases upon insurance, is made to turn upon the point whether the assured really had anything at hazard; whether the contract was an indemnity against a possible loss, or was a mere wager upon the happening of an event, which, in itself, was indifferent to the assured. In *Crawford v. Hunter*, 8 T. R. 14, Lord Kenyon says: "Then can a trustee insure? There is no doubt but he may. Can a consignee insure? Surely he may. And if a mere naked trustee may insure, who has no beneficial interest, it would be grossly absurd to hold that the *cestui que trust*, who has the whole interest, could not insure." But in the case of *Lucena v. Crawford et al.*, in the exchequer chamber, 3 B. & P. 75, which seems to be the same case above cited, but

 Damages. — Rebuilding.

under a different name, the right of the agent, trustee, or consignee, to insure is fully confirmed by the almost unanimous opinion of all the judges in the exchequer chamber. This subject will be found, among others, very ably discussed in *Godin v. The London Assurance Co.* 1 Burr. 489; also in *Godsall v. Boldero*, 9 East,

72; and in the notes of Smith's Leading Cases, 2d ed. 165, *et seq.*, where most of the cases upon this subject are collected and studiously and judiciously digested. The cases by the plaintiff's counsel show, that the same rule has prevailed extensively in this country.

 EDWARD BRINLEY vs. THE NATIONAL INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1846.)

 Damages. — Rebuilding.

In all cases where no rule of damages is established by law, the jury are to decide upon the question, and to their decision there can be no legal exception.

In an action upon a fire insurance policy, it appeared that the property insured, a store, having burnt down, was rebuilt by the company, according to the terms of the policy, but upon a plan somewhat different from the original; and the jury were instructed that no deduction was to be made from the expense of rebuilding, though the new store might be more durable than the old would have been, and for some purposes more valuable. *Held*, erroneous.

ACTION of assumpsit upon a fire policy on a brick store building. The building had been replaced, in accordance with a provision in the policy giving the company the right to rebuild.

The trial in the court below was before Shaw, C. J., who reported the case thus: —

There was proof that the store was totally destroyed by fire, within the year, and that the policy was assigned by the assured, after the loss, to the plaintiff, with the consent of the defendants; and no objection was made to the plaintiff's bringing action in his own name.

The store having been rebuilt upon a plan different from that of the one destroyed, the cost of the new building could not be the measure of the plaintiff's loss by the destruction of the old one. There was much conflicting evidence, and many varying estimates of the cost of erecting a new building of the same dimensions and materials, and upon the same plan with that of the one burnt; all of which was left to the jury.

The defendants contended that, as a store of similar dimensions and plan with the old one, built of new materials, would

¹ 11 Met. 195.

Damages. — Rebuilding.

be worth more than the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and such new store; analogous to the deduction of new for old in the adjustment of losses on marine policies. This position was not sustained by the judge; but the jury were instructed, that the contract was a contract of indemnity; that, to afford indemnity, the defendants were bound either to replace the building in as good condition as it was in before the fire, or to pay the plaintiff a sum of money sufficient to place the assured, as owner of the building, in as good a situation as if the fire had not happened; that, in doing this, if any materials were left, they might be used, as far as they would go, and as far as they were fit, in rebuilding; but if the building could not be placed in as good a condition as it was in before, without using new materials, and new materials were used, no deduction should be made on that account, although it might be more durable than the old building would have been, and for some purposes more valuable.

The jury returned a verdict for \$3,689, which is to be set aside, and a new trial granted, if the above instruction was wrong; otherwise, judgment to be entered on the verdict.

Gardiner & English, for the defendants.

M. S. Clarke, for the plaintiff.

The opinion of the court was delivered by

WILDE, J. At the trial, the defendants contended that as a new store of similar dimension and plan with the old one, built of new materials, would be worth more than the old one, a deduction ought to be made from the estimated cost of a new store, for the difference in value between the old store and the new one; analogous to the deduction of new for old in the adjustment of losses on marine policies. This claim of deduction was not sustained by the judge at the trial, and we are not aware of any authority or principle by which it can be supported. The rule in adjusting marine losses, is arbitrary, and operates in some cases unjustly, giving to the insured more or less than a full indemnity, to which he is entitled by the policy, and to no more. The rule originated from the usages among merchants and underwriters, probably from the great difficulty of ascertaining the actual loss, without first repairing the dam-

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age done, or estimating the cost of repairs. The rule is applicable only to cases of a partial or a constructive total loss. It depends on usage, sanctioned by judicial decisions; and in some cases this rule of estimating the loss is expressly provided for by the terms of the policy. Such has been the stipulation in the marine policies in Boston, for many years. But the rule has never been adapted to policies of insurance on buildings and other property against fire.

The question then is, what is the rule of damages, if any there be, in cases like the present? The plaintiff's counsel contends that the actual loss is to be ascertained by the expense of restoring the property without any deduction for the difference of value between the new and old materials; and so the rule is laid down by Professor Greenleaf. 2 Greenl. on Ev. § 407. But the only adjudicated case he cites, which has any direct bearing on the question, is that of *Vance v. Foster*, 1 Irish Circuit Cases, 51, in which Mr. Baron Pennefather laid down a very different rule. He says, as is reported in 3 Stephens N. P. 2084, that "the jury are to say what state of repair the machinery was in, what it would cost to replace it by new machinery, and how much better (if at all) the mill" in which the machinery was placed "would be with the new machinery, than it was at the time of the fire; and the difference is to be deducted from the entire expense of placing there such new machinery." This rule, in all cases where the cost of repairs is one of the elements by which the jury are to estimate the actual loss, seems to be founded on the principles of justice, as it will give to the assured a full indemnity, and no more; to which he is entitled by the contract. But by the rule contended for by the plaintiff's counsel, the assured in most cases would recover more than an indemnity; and much more, when the building insured is dilapidated and much out of repair. Such rule is not supported by any principle of justice, nor by the authority of any adjudged case. It is founded on an erroneous construction of the contract. It supposes that the insurers are bound to repair the building, or to pay the expenses of the repairs. But no such obligation is imposed on them by the policy. They have the privilege to make the requisite repairs, if they see fit, to protect themselves against the recovery of excessive

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damages, or for any other reason. But if they elect not to make the repairs, they are liable only to pay a fair indemnity for the loss. But whatever may be the rule when the building insured is partially injured by the peril insured against, it has no application to cases like the present, where the building is totally destroyed and is to be replaced by a new one. The rule of damages in cases on marine policies would not apply to a case where the ship had been totally destroyed. In the present case, the building was destroyed by fire, and a new building was erected upon a different plan; so that the cost of a new building could not be certainly ascertained. If the rule laid down in *Vance v. Foster* were applied, the jury must ascertain, by the estimates and opinions of witnesses, the amount of the expenses of a new building, and they must estimate the value of the old building, in order to ascertain the difference, if any there be, between the new and the old. We can perceive no use in requiring this double estimate; for where the plaintiff is only entitled to recover the amount of the value of the building destroyed, the estimate of the cost of a new building is useless. We are therefore of opinion that there is no rule of damages applicable to the present case; and that in all cases where no rule of damages is established by law, the jury are to decide upon the question, and that to their decision there can be no legal exception.

The instructions were conformable to these principles, except in one particular. The jury were instructed that no deduction was to be made from the expenses of repairing or rebuilding the store insured, although the new building might be more durable than the old building would have been, and for some purposes more valuable. In this respect, we think the jury were misdirected, and consequently that the defendants are entitled to a new trial.

See upon the subject of damages generally, *Vance v. Foster*, 2 Craw. & D. 118, ante, p. 68; *Hoffman v. Western Ins. Co.* 1 La. An. 216, post; *Henderson v. Western Ins. Co.* 10 Rob. (La.) 164; *Niblo v. North American Ins. Co.* 1 Sand. 551, post; *Menzies v. North British Ins. Co.* 9 Sess. Cas. N. S. (Scotland) 697, post; *Underhill v. Agawam Mutual Insurance* Co. 6 Cush. 440, post; *Wolf v. Howard Ins. Co.* 1 Sand. 124; *S. C.* 3 Seld. 583, post; *Ellmaker v. Franklin Ins. Co.* 5 Barr, 183, post; *Mississippi Mut. Ins. Co.* 34 Miss. 215 (1857); *McCraig v. Quaker City Ins. Co.* 18 Upper Can. Q. B. 130 (1859); *Insurance Co. v. Rupp.* 29 Penn. St. 526 (1858); *Commonwealth Ins. Co. v. Sennet*, 37 Penn. St. 205 (1860);

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Parker v. Eagle Fire Ins. Co. 9 Gray, 152 (1857); *Peoria Ins. Co. v. Wilson*, 5 Minn. 53 (1860); *Hoffman v. Aetna Fire Ins. Co.* 1 Rob. (N. Y.) 501; *S. C.* 32 N. Y. 405; *Morill v. Irving Fire Ins. Co.* 33 N. Y. 429 (1865); *Burgess v. Alliance Ins. Co.* 10 Allen, 221 (1865); *Boston & Salem Ins. Co. v. Royal Ins. Co.* 12 Allen, 381 (1866); *Matthewson v. Webster Assur. Co.* 10 Lower Can. 8 (1859); *Rex v. Ins. Co.* 2 Phil. (Pa.) 357 (1858); *In re Wight*, 1 Ad. & E. 621 (1834); *Sun Fire Office v. Wright*, 3 Nev. & M. 819 (1834); *Leonarda v. Phoenix Assur. Co.* 2 Rob. (La.) 131 (1842).

McCULLOCH & others vs. THE INDIANA MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Indiana, May Term, 1846.)

Alienation. — Mortgage. — Effect of.

By the express terms of the act incorporating the Indiana Mutual Fire Insurance Company, if any building insured "is alienated by sale or otherwise, the policy shall be void," and the lien on the property continues no longer.

A mortgage is an alienation within the meaning of that clause.

The personal liability of the assured, if any, on his deposit note, is to be enforced only in a common law, and not in a chancery court.

ERROR to the Union circuit court.

DEWEY, J. The Indiana Mutual Fire Insurance Company brought a bill in equity against S. McCulloch, W. McCulloch, Haworth, Stephens, and Vinnedge, in February, 1842. The bill alleges that on the 1st August, 1838, S. McCulloch procured from the complainants a policy insuring certain buildings from destruction by fire for six years, and at the same time executed his note to the complainants for the premium of insurance, amounting to \$348; that on the 28th July, 1842, there was assessed by the board of directors of the company the sum of \$46.98 against S. McCulloch for losses sustained by fire after July 11, 1841, that being his ratable share of such losses by virtue of his premium note; that he had due notice of the assessment and refused to pay it; that on the 28th November, 1840, S. McCulloch conveyed the ground, on which one of the insured buildings stood, to Vinnedge in fee simple, by a deed duly recorded; that he afterwards, on the 31st December, 1841, mortgaged the same property to W. McCulloch, to secure \$193.67, the mortgage being duly recorded; that on the 9th of

¹ 8 Blackf. 50.

July, 1841, he conveyed the ground on which the other insured buildings stood to Haworth and Stephens, in fee simple, by a deed duly recorded; that S. McCulloch was insolvent; and that his premium note was a lien on the insured buildings and the land on which they stood. The prayer of the bill was, that the premium note be decreed to be paid; that the same be made a charge on the insured premises; and that in default of payment the premises, or enough to satisfy the debt and costs, be sold, &c. All the defendants, except S. McCulloch, demurred to the bill, and the demurrer was overruled. These defendants declining to answer, the bill was taken as confessed against them.

S. McCulloch answered, making his answer a cross-bill, from which, the answer thereto, and the depositions, the following further facts appeared. The deed to Vinnedge and that to Haworth and Stephens, mentioned in the bill, were mortgages, being subject to defences, which were duly recorded. In February, 1841, the complainants recovered a judgment against S. McCulloch, before a justice of the peace, for \$76.50, for assessments of losses made previous thereto. On the 11th August, 1841, another assessment was made against him for \$28.71. About the 1st October, 1841, S. McCulloch gave his policy to the complainants' agent, for the purpose of having it surrendered and cancelled, that he might lift his premium note. The agent sent the policy to the proper officers of the company at Indianapolis, who returned it, informing the agent that the company would not receive the same and cancel it, unless S. McCulloch would first pay the judgment against him and the assessment of August 11, 1841, but that if he would pay those demands the policy should be cancelled and the premium note given up, of all which S. McCulloch was informed. On the 1st December, 1841, he paid the agent the full amount, as was supposed, of the judgment and of the assessment of August 11, 1841, and took a receipt in full, but owing to an error of computation by the agent the sum paid was too small by \$10, leaving that amount still due the complainants. This sum S. McCulloch refused to pay until the 22d of September, 1843, after the filing of the bill, when he paid it and the interest. In the mean time the complainants, in addition to the assessment

of the 28th July, 1842, mentioned in the bill, continued to make assessments against S. McCulloch up to the time of the commencement of the suit.

The court decreed that the complainants recover of S. McCulloch \$384, the amount of his premium note, to be discharged, however, by the payment of \$103.94, that being the amount of the assessments against him in arrear at the expiration of his policy; that the sheriff of the county sell the insured buildings and the ground on which they stand; and that from the proceeds of the sale he first pay the costs of suit, then \$103.94 to the complainants, and the balance, if any, to S. McCulloch.

By the charter of the Indiana Mutual Fire Insurance Company, which is a public act, it is provided that any person who may take an insurance from the company shall become a member thereof; that at the time of receiving his policy, he shall give his note for the amount of the premium, a part of which note, not to exceed ten per cent., to be prescribed by the directors, shall be paid down, and the remainder payable in part or in whole at any time when the directors shall deem it requisite to meet losses or other expenses; and at the expiration of the term of insurance the premium note, or such part of it as shall remain unpaid, shall be surrendered to the maker. The directors are required, if any of the insured property shall be destroyed by fire, to make an annual assessment of the same, and to apportion to each member of the company his share of the loss, according to the amount of his premium note; and if such member shall refuse, for thirty days after proper notice given, to pay his assessment, the company is authorized to bring suit on his premium note, and recover the whole amount thereof, which, when collected, shall remain in the treasury of the company, subject to the payment of losses incurred or to be incurred during the period of insurance, the balance, if any, to be returned to the assured. All buildings insured by and with said company, together with the right, title, and interest of the assured to the lands on which they stand, shall be pledged to said company, and the said company shall have a lien thereon against the assured during the continuance of his policy. But, when any house or other building shall be alienated by sale or otherwise, the policy shall be void, and be surrendered to the

Alienation.—Mortgage.—Effect of.

directors of the company to be cancelled; and upon such surrender the assured shall be entitled to his deposit premium note, upon the payment of his proportion of all losses and expenses that have occurred prior to such surrender; provided, however, that the alienee may, with the consent of the company, take an assignment of the policy in the manner pointed out by the charter.

These are all the provisions of the act of incorporation that have any bearing upon the cause before us; and they do not, in our opinion, sustain the decree of the circuit court. The object of the bill was to enforce a supposed lien on the insured property in the hands of purchasers from the assured. But the lien given by the charter is in terms confined to insured persons, and limited in duration to the continuance of the policy. Whether this latter provision can be so construed as to extend the lien so as to bind the property in the hands of the assured himself, after the expiration of the policy, for liabilities incurred before, it is not now necessary to decide; but by no latitude of construction can it be extended to his grantee or alienee. There is not a single provision in the charter, from which we can infer that it was designed the lien should operate against him, unless he shall choose to continue the policy by taking an assignment of it in the manner prescribed. On the contrary, the omission to make any provision for giving notice to the public of the existence of the lien created by the act, is a strong argument that the legislature did not design it to extend to purchasers of the insured property. A person not a member of the company has no right to inspect the books and files of the company kept at Indianapolis, the only source of such information of what property has been insured. We cannot believe it was the design of the legislature to subject purchasers to the operation of a lien, the existence of which they had no sure means of ascertaining. But what is conclusive on this subject is, that an alienation of the insured property, *ipso facto*, renders the policy void, unless the purchaser with the consent of the company, takes an assignment of it, and secures the premium note of his grantor; and by the express enactment of the charter the company's lien exists only during the existence of the policy. As an assignment of the policy under considera-

Alienation. — Mortgage. — Effect of.

tion was made or attempted, both the policy and the company's lien on the insured property ceased to exist, provided the assured, S. McCulloch, made an alienation of the property.

The point on which we have doubted is, whether a mortgage is an alienation within the meaning of the charter? We have come to the conclusion that it must be so considered. If it be viewed in any other light, one of two consequences must follow, — either every insured person has it in his power to destroy the value of the company's lien on the insured property by mortgaging it for as much as it is worth while the liability of the company will continue on the policy, or a mortgagee must be subjected to the operation of a secret lien to discover which is beyond his power. There is injustice in either result, but it is obviated almost entirely by considering a mortgage as such an alienation as shall at once annul both the policy and lien.

But though the policy was avoided and the lien annulled by the alienation of the insured property by S. McCulloch, still his personal liability continued on the premium note, until an actual surrender of the policy to the company, and the payment of all assessments against him for losses sustained by the company before the surrender. Whether the facts of the case show that he discharged this liability or not, it is not material now to decide; for if he did not, that liability is a matter exclusively of common law jurisdiction, and can give the company no right to seek relief against him in a court of equity. According to the view we have taken of the subject there is no equity against the other defendants. Their demurrer to the bill should have been allowed.

Per CURIAM. The decree is reversed with costs. Cause remanded, &c.

J. Perry & J. S. Reid, for the plaintiffs.

J. S. Newman & J. Yaryan, for the defendants.

THE INDIANA MUTUAL FIRE INSURANCE COMPANY vs. CHAMBERLAIN & others.¹

(Supreme Court, Indiana, May Term, 1846.)

Mutual Insurance. — Lien. — Death of Insured.

The lien provided for by the charter of the Indiana Mutual Fire Insurance Company expires with the death of the insured, so that it cannot be enforced against his heirs for losses occurring after his death; the heirs not having ratified or confirmed the policy.

APPEAL from Tippecanoe circuit court.

PERKINS, J. Bill in chancery by the Indiana Mutual Fire Insurance Company against the heirs of John C. Chamberlain, deceased, and a terre-tenant, to enforce the lien and payment of a premium note against real estate insured. The bill shows that the insurance was effected by Chamberlain on the 1st of March, 1839; that in the fall of the same year he died, nothing being then in arrear on this premium note to the insurance company; that the assessments, the non-payment of which forfeited the premium note, were made for losses which happened nearly a year subsequent to the death of Chamberlain; and that the real estate insured has descended to his heirs. The circuit court dismissed the bill, on demurrer, for want of equity.

If this bill can be sustained, it must be upon one of two grounds; either that the lien of this premium note continues to adhere to the property insured in the possession of the heirs, or that the heirs, by virtue of the proviso to the fifteenth section of the charter of the company, have themselves become members of said company, by procuring the policy to be ratified and confirmed to them.

That the lien of the premium note does not continue upon the property in the hands of alienees, is decided by the case of *McCulloch v. The Indiana Mutual Fire Ins. Co.*,² the present term of this court; and we are satisfied, upon a full examination, that heirs, by the spirit and meaning of the original charter, are placed upon the same footing with alienees; that though not technically, yet within the intent of the charter, descent is an alienation, and that thereby the lien of the insurance upon the property is divested.

¹ 8 Blackf. 150.² *Ante*, p. 475.

Damaged Goods. — Fraud. — Burden of Proof. — Arson. — Proof of.

As to the second ground, it is not pretended that these heirs have procured a confirmation of the policy to themselves. We think the heirs have nothing to do with this matter. It is our opinion that the personal representative of the deceased might, under the fifteenth section of the charter, surrender the policy to the company to be cancelled, unless an assignment of it was claimed by the heirs, and that he might be liable, in his representative capacity, to pay arrearages due thereon as a debt of the intestate. If the heirs chose to have an assignment of the policy, we think they would have been entitled to the same as alienees, in order that it might be ratified to them.

The court committed no error in dismissing the bill.

Per CURIAM. The decree is affirmed with costs.

G. S. Orth, for the appellants.

J. Pettit & S. A. Huff, for the appellees.

HOFFMAN vs. THE WESTERN MARINE AND FIRE INSURANCE COMPANY.¹

(Supreme Court, Louisiana, June Term, 1846.)

Damaged Goods. — Fraud. — Burden of Proof. — Arson. — Proof of.

Where goods insured against fire are destroyed, the insurer is bound to pay their value at the time of the loss; if damaged only, he is bound for the damage between their value in their sound and damaged condition. Where the goods are so much damaged as not to be salable in the ordinary mode, a fair sale at auction made by the assured, after reasonable notice to the insurers, or with their knowledge, may be considered by a jury in estimating the damage, and in ascertaining the amount of the indemnity; but the price for which such damaged goods were sold at auction by the assured, without notice to, or knowledge by, the insurers of the sale, is not sufficient evidence of the value of the goods in their damaged condition.

Where in an action on a policy of insurance containing the usual condition, that if there be any fraud or false swearing, all claim under the policy shall be forfeited, there is a difference between the amount of loss sworn to by the insured in his account presented to the insurers and that proved on the trial, such difference is not conclusive evidence of fraud and false swearing; but the burden of proving that the difference was the result of error, and not of intention to defraud the insurers, is on the plaintiff, and, in the absence of any satisfactory explanation, it must be considered as imposing on the insured a forfeiture of all claim under the policy.

Where in an action against an insurer for loss by fire, the defence is that the assured

¹ 1 La. An. 216.

himself set fire to the premises, the evidence for the defence is not required to be as full and conclusive as would be necessary to support an indictment for arson.

A court may, at the instance of a party, order a case to be tried before a jury, even after the trial had been commenced before the court alone.

APPEAL from the commercial court of New Orleans, Watts, J.

The judgment of the court was pronounced by

SLIDELL, J. This is a suit on a fire policy upon merchandise, bed-room furniture, &c., in a store occupied by plaintiff. The amount claimed is based upon an account annexed to the petition. This account is composed mainly of items exhibiting the sound value of the goods as appraised in the store after the fire, a few of the items are for goods lost or destroyed at the fire, put down at an appraised value. From the total of these items thus appraised, is deducted the net amount which the goods and furniture produced at an auction, ordered by the plaintiff, after the company had refused to pay him; and for the balance, the difference between the appraised value and the auction sales, being \$1,231.19, the plaintiff sues, and has obtained a verdict. The evidence at the trial was of the same character. The appraisements of the goods and furniture were offered, and the accounts of the auction sales were also offered. The jury gave their verdict for the precise balance stated in the account annexed to the petition.

The insurers' liability is distinctly defined by the policy, and by well ascertained principles of the law of insurance. If goods are wholly destroyed by fire, the insurer is bound to make indemnity by paying their value at the time of the loss. If the goods be not destroyed but damaged, the insurer is bound, by the like rule of indemnity, to pay the assured the difference of value between the goods in their sound and in their damaged condition. The idea of a right of abandonment of the goods, which seems to have existed in the plaintiff's mind, and in that of his principal witness, who assisted him in making out the appraisal, is entirely unsanctioned by the law of fire insurance. Insurance companies sometimes assent to the sale of damaged goods at auction to ascertain the value, but they are under no obligation so to do, without a clause to that effect. When they assent to that course to ascertain the damaged value, the indemnity is the difference between the auction return and their sound value at the date of the fire. Where a sale is thus made

with their assent, or without their assent, yet upon notice to them, it is obvious that they could have an opportunity for being represented at the sale, and of taking measures to prevent an undue sacrifice.

The court below was requested by the defendants' counsel, to charge the jury, that the difference between the price for which the goods injured by the fire were sold at public auction and the valuation of said goods before they were injured, was not a proper criterion to fix and determine the amount of indemnity for which the defendants were liable under their contract of insurance, and that the amount of damage or injury sustained by the property insured ought to have been proved by other testimony, or legal evidence; but the court refused to charge the jury as required, but charged them on the contrary, that the auction sale and valuation of the property as aforesaid, afforded a proper basis to establish the amount of indemnity to which the plaintiff was entitled. The minds of the jury might have been misled by this refusal, and charge of the court, and it is natural to suppose that they were so, as they have given their verdict for the precise difference between the appraisement and the auction sales.

In our opinion the charge of the court should have been that one assured in a fire policy is entitled to recover the fair market value at the date of the fire of goods totally destroyed, and, as to goods damaged, the difference between the value, at the date of the fire, of goods in their damaged state and like goods undamaged; and that in ascertaining the damaged value, a fair sale at auction made by the assured, in cases where the goods are so much damaged as not to be salable in the ordinary mode, and upon reasonable notice given to the insurer or with the insurer's knowledge, may be considered by the jury in estimating the extent of damage, and ascertaining the amount of indemnity. But that when an auction sale is made by the assured without notice to, or knowledge by, the insurer, the mere returns of sale are not of themselves sufficient evidence of the damaged value.

In the present case the insurers were parties to the appraisement, their own agent having acted and signed as one of the appraisers, and so no fraud or mistake in the framing of the

appraisement is proved ; the company is bound by it, as *prima facie* evidence of the sound value of the goods, both of those lost or destroyed by the fire, and of those which existed at the store after the fire, in a damaged condition. But there is no satisfactory evidence, in addition to the auction sales, to show the extent of the damage.

It is obvious that, by taking the mere auction sale, made without proof of notice or privity of the insurer, a fair measure of indemnity is not given, for goods sold under the hammer as damaged goods might well be sacrificed. In the present case we are not able to say whether there was a sacrifice as to the merchandise, as the appraisement was single, to wit, of sound value only. But with regard to the furniture, it appears that the appraisers made a double appraisement, estimating the value before the fire at \$231, and the damage by the fire, which was the loss to the plaintiffs, at \$45, thus leaving its value in its damaged condition at \$135.54, whereas it was sold at auction for the gross sum of only \$48.12, and a net sum of \$42.46, which latter amount only is credited to the insurers by the plaintiff's petition and by the finding of the jury. We should not suppose the sacrifice as great in the case of the merchandise, but we are still left in doubt by the evidence as to the extent of the damage, having no guide but the auctioneer's returns.

Under these circumstances, and without entering into a consideration of the charge of fraud, we deem it our duty to remand this cause. In doing so, however, it is proper to notice some other questions of law presented in this case.

The defendants asked the court to charge the jury, that "the difference between \$3,688.80, the amount sworn to by the plaintiff in the account presented by him on the 5th August, 1843," three days after the fire, "and the account in evidence, is to be considered by the jury as evidence of fraud and false swearing by the plaintiff, so as to bring him under the effect of the ninth condition of the policy of insurance in this case." The condition is the usual condition ; it follows the usual clause as to giving notice to the company, delivering a particular account, &c., and is in these words : "Also if there appear any fraud or false swearing, the claimant shall forfeit all claim by

virtue of this policy." The plaintiff, on the other hand, asked the court to charge that, "if the plaintiff fail to sustain his affidavit by direct evidence to the amount claimed, he is not therefore necessarily to be considered as having sworn falsely, and thereby forfeited the policy."

The court gave the charge as requested by the plaintiff, but added, that the false swearing must be an *intentional* false swearing, for the purpose of recovering from the insurance company an amount of value beyond what the party knew to be the value of the goods in the store. And the court further charged as requested by the defendants.

We think the course of the judge was substantially correct. His charge, as a whole, substantially amounts to this: that the jury will consider whether the discrepancy between the account sworn to and the value as proved at the trial, is to be fairly attributed to an intention to defraud the insurer, or to an innocent error on the part of the assured; that the burden of explanation is upon the plaintiff; and that, if the discrepancy be unexplained to the satisfaction of the jury upon a fair consideration of the whole evidence, it imposes upon the assured a forfeiture of all claims by virtue of the policy.

The defendants asked the court to charge the jury, that "the evidence to prove that the plaintiff set fire to his own store is not to be as full and conclusive as on an indictment against him for arson, but that the same may be shown by presumption as well as by direct evidence; and that, if they believe presumptive or circumstantial evidence exists to support such a defence in this case, they must find for the defendants." The court refused so to charge, but appears, in the terms of plaintiff's application, to have charged the jury that, in a claim against an insurer for loss by fire, when the defence is that the assured himself set fire to the premises insured, the facts are to be as fully proved as on an indictment for arson; but where a policy provides against fraud and false swearing, any evidence which will satisfy a jury that there was fraud or false swearing is sufficient to justify a verdict for defendants. The court further added, in adoption of the plaintiff's application, that, in a matter of this kind, every species of evidence, whether circumstantial or presumptive, which tends to convince the mind, may be added, whether on the one side or the other.

Secretary's Authority. — Alienation. — Mortgage. — Assignment. — Action.

We think that the jury should not have been instructed to require the same full proof to discharge an insurer as would be necessary to convict the assured for arson under our statutes. The position of the claimant in the one case, and of the prisoner in the other, is not identical; and a jury might perhaps with justice refuse to condemn the defendant in the criminal prosecution, to whom, upon the same evidence, they would refuse a verdict, were he the plaintiff, in a suit upon a policy of insurance.

The defendants' exception to the order that the cause should be tried by a jury, after the trial by the court had commenced, is not tenable. The plaintiff made his motion for a jury, on the suggestion of the court, that the court desired the trial to be by jury. If a court may, *ex officio*, order a new trial after a judgment has been rendered, it may well suggest and grant the trial of the cause by a jury after the case has been opened. This was a matter within the discretion of the court below, and, considering the nature of the controversy, was very properly exercised.

It is therefore ordered that the judgment of the court below be reversed, and that this cause be remanded to the fourth district court of New Orleans for a new trial, the plaintiff paying the costs of this appeal.

W. H. & R. Hunt, for the plaintiff.

Maybin & Roselius, for the appellants.

See as to the matter of damages, *Brinley* of arson, see *Thurtell v. Beaumont*, 1 Bing. v. *National Ins. Co.* 11 Met. 195, post, and 339 (1824); ante, vol. i. p. 131, and cases cases cited. As to the question of proof cited in note, p. 138.

CONOVER vs. THE MUTUAL INSURANCE COMPANY OF THE CITY AND COUNTY OF ALBANY.¹

(Supreme Court, New York, July Term, 1846.)

Secretary's Authority. — Alienation. — Mortgage. — Assignment. — Action.

The authority of the secretary of an insurance company to consent, for the company, to an assignment of a policy issued by them will be presumed, when it is given at the company's office.

¹ 3 Denio, 254.

 Secretary's Authority. — Alienation. — Mortgage. — Assignment. — Action.

A mortgage *held* not to be an alienation of the property, under the company's charter. When a mortgage of the property insured is made, and the policy assigned to the mortgagee before loss, the action should still be brought in the name of the original party insured.

ACTION upon a fire insurance policy, containing the following provision: "The interest of the insured in the policy is not assignable unless by consent of the company manifested in writing, in pursuance of the by-laws of the company, and the same be indorsed on, or annexed to this policy." The premises insured were subsequently mortgaged to one Gridley, by way of security for a loan of money; and an assignment of the policy was also made to him, the consent of the company being indorsed upon the policy by the secretary, at the company's office. Evidence was given that such acts had often been done by the secretary; though there was nothing in the by-laws giving him power to do so.

R. W. Peckham, for the plaintiff.

S. Stevens, for the defendants.

By the Court, BRONSON, C. J. The circuit judge had a discretion to disregard the variance as amendable; and for the exercise of that discretion a bill of exceptions will not lie. 2 R. S. 406, § 79; *Mappa v. Pease*, 15 Wend. 669; *Mann v. Herkimer Mutual Ins. Co.* 4 Hill, 187.

There was sufficient evidence to carry the cause to the jury on the question of authority in the secretary to consent to the assignment of the policy. Although he had no written authority, he had often given consent in other cases; and the jury could not but have found, upon the evidence, that what he did had been approved by the company. And besides; it was enough that the secretary was a principal officer or agent of the company, and that he gave the consent on application for that purpose, at the place where the company transacted its business. His authority should be presumed until the contrary appears. *Bank of Vergennes v. Warren*, 7 Hill, 91. If the case of *Dawes v. The North River Ins. Co.* 7 Cowen, 462, must be considered as laying down a different doctrine, we feel constrained to say that the decision cannot be supported.

The defendants insist that the mortgage to Gridley was an alienation of the insured property within the meaning of the

Fraudulent Assignment of Property. — Alienation.

seventh section of the charter of the company. Statutes of 1836, p. 315, and 44. But we think otherwise. The alienation spoken of in the statute is an absolute transfer of the title to the property. The mortgage only created a lien on the land for the security of a debt.

If the case had been within the seventh section of the charter, the action should have been brought in the name of Gridley. *Mann v. The Herkimer Ins. Co.* 4 Hill, 187. But as the case was not within that section, the action was necessarily brought in the name of Conover, though for the benefit of Gridley. *Jessel v. The Williamsburgh Ins. Co.* 3 Hill, 88. There was no error on the trial. *New trial denied.*

See *Conover v. Mutual Ins. Co.* 1 Comst. 290, *post*.

THE DADMUN MANUFACTURING COMPANY vs. THE WORCESTER
MUTUAL INSURANCE COMPANY.

ALEXANDER DE WITT *et al.* vs. THE SAME.¹

(Supreme Court, Massachusetts, September Term, 1846.)

Fraudulent Assignment of Property. — Alienation.

The assured, being embarrassed, assigned their property, including the premises insured, to trustees to sell the same and pay the debts secured by the assignment; the deed of assignment containing only a qualified release of the assignors. In an action upon the policy of insurance, the assured contended, in reply to the defence that the policy was avoided by the assignment, that the deed was void. *Held*, that however this might be, it did not lie with the assignors to aver their fraud in making the deed of assignment, in order to avoid the title made by them under it, and thus fall back upon their former title. The deed of trust was an alienation and avoided the policy.

The provision of the by-laws requiring notice of assignment of the policy refers to assignment made before the loss.

ASSUMPSIT, in two actions, upon the same policy, one by the parties originally insured, the other by their assignees. The policy contained a provision that the alienation, in any way, of the property insured should avoid the insurance, unless notice should be given to the company, and an assignment made to the new owner of the property within sixty days after the

¹ 11 Met. 429.

assignment. The rest of the case is sufficiently stated in the opinion of the court.

HUBBARD, J. It is a fundamental principle of the law of insurance, that the assured must have something at risk at the time of the loss, to entitle him to recover. Otherwise, wager policies would constantly be made, and gambling would be carried on, under the name of insurance.

The facts in this case are, that the assured, being embarrassed, assigned their property, including the premises insured, to Dadmun, Church, and Lord, as trustees, to sell the same and pay the debts secured by the assignment; and the deed of assignment contained only a qualified release of the assignors. This deed, it is now said by the plaintiffs, was fraudulent and void against creditors, by force of the statutes of 1836 and 1838. However that may be, it does not lie with the assignors to aver their fraud in making that deed, in order to avoid the title made by them under it, and thus be allowed to fall back upon their former title. *Carroll v. Boston Marine Ins. Co.* 8 Mass. 515.

The insured property was sold at auction, in August, 1844, under an interlocutory decree of the circuit court of the United States, for a valuable consideration, to De Witt, Skinner, and Jones, who had bought up the greater part of the debts against the assignors, after the bill in equity was filed against the assignors and assignees, by a creditor who was not a party to the assignment; and the assignees afterwards executed a deed to said De Witt and others, pursuant to such decree. And we are of opinion that this deed conveyed the whole estate to the purchasers, with the knowledge and consent of the assignors, who are plaintiffs in the first of these actions; and that, by reason thereof, there remained in them no longer any legal or equitable estate, and that they had nothing at risk in the insured premises.

But no notice of that conveyance was given to the defendants, nor did any assignment of the policy take place within sixty days thereafter. This was a violation of the tenth rule or by-law of the defendants, of which they may avail themselves. It is said that this conveyance was in trust to pay debts which the property was more than sufficient to cover. But this

Vendor and Purchaser. — Loss by Fire on Premises sold but not conveyed.

fact does not alter the character of the conveyance, nor make it less an alienation. A payment of those debts by the assignors themselves would not have revested the estate in them. To produce this effect, a conveyance from their grantees would have been necessary. But no such payment took place. Other creditors came in, and a public sale was made, which took away any equitable interest which the assignors had in the estate.

The assignment of the policy, after the loss, and within sixty days from the conveyance, does not bear upon the case. The provisions of the defendants' tenth rule or by-law relate to assignments before a loss, and when the insurers have a right to know, and an interest in knowing, for what persons they stand as insurers; and for their protection in this respect, that rule was made. But after a loss, the rights and duties of the parties are changed. The policy is then a mere chose in action, and may be assigned, like any other chose in action, and a suit may be maintained thereon, for the benefit of the assignee, in the name of the insured. But the plaintiffs in the first of these actions had parted with the insured property, before the loss, without giving the required notice; and at the time of the loss they had nothing at risk.

Judgment in both actions for the defendants.

GATES & others vs. SMITH & others.¹

(Vice-chancellor's Court, New York, September, 1846.)

Vendor and Purchaser. — Loss by Fire on Premises sold but not conveyed.

In a petition by N. in the course of a suit for partition, it appeared that N. had purchased the premises under a decree of the court, and that the master's report had been confirmed, but no conveyance had been executed. Prior to the partition sale the premises had been insured by the parties to the suit, and after the sale and confirmation to N. the property was destroyed by fire. *Held*, that in equity the property belonged to N., and that she was entitled to the insurance, and that the other parties must unite in giving her the necessary authority to settle and adjust the loss.

THIS was a petition made in the course of a suit for partition, in which the petitioner, Ann Nesbit, defendant in the suit

¹ 4 Edw. Ch. 702.

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for partition, prayed that the other parties to the cause be compelled to give her full authority to adjust and settle the loss in question, and to perform other acts required by the policy. It appeared that a sale of the premises had been made in the case by the master, under orders of the court, and that Ann Nesbit, one of the tenants, had purchased the property, and that the master's report had been confirmed. No conveyance had, however, been executed. Before the sale the tenants had insured the property in their joint names, and after the sale and confirmation, the premises were destroyed by fire. Two of these tenants refused to give their consent and authority to Ann to adjust the loss.

W. N. Dyckman & John Wallis, for Nesbit.

B. F. Butler, contra.

The VICE-CHANCELLOR. From the time when the master's report of sale became confirmed, and which was on the tenth day of July, one thousand eight hundred and forty-five, Mrs. Nesbit became the owner of the house and lot, although no deed was executed conveying the property to her.

The legal title could not vest in her without a deed of conveyance. In strictness of law, it was not a sale, but only a contract of sale until consummated by a conveyance of the legal title and estate. *Edwards v. Farmers' Loan Co.* 21 Wend. 468; *S. C.* 26 Ib. 541.

In equity, however, it is regarded differently as to all the purposes of ownership, so that the buildings, after confirmation of the report of sale, are considered at the risk of the purchaser; and, if burnt down, the loss falls upon him. But, if destroyed after the contract of sale and before its confirmation by the court, the vendor, or he in whose behalf the property is sold, bears the loss. This is the rule in the English chancery with respect to judicial sales. *Ex parte Minor*, 11 Ves. 559. I see no reason why it should not be the rule here in sales under decrees which require confirmation before deeds can be given.

So, in ordinary cases of sales by private contract of parties. It is held in England that, if the purchaser agrees to accept the title after the abstract has been furnished, he, from that moment, becomes the owner; and if buildings are destroyed before actual conveyance, it is the purchaser's loss. This was held in

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Paine v. Meller, 6 Ves. 349, where Lord Eldon uses this language: "As to the mere effect of the accident itself" (which was a burning of the house after the defendant had declared himself satisfied with the title and before the deed could be executed to him), "no solid objection can be founded upon that simply, for if the party by the contract has become, in equity, the owner of the premises, they are his to all intents and purposes. They are vendible as his; chargeable as his; capable of being incumbered as his; they may be devised as his; they may be assets; and they would descend to his heirs." This is the true and correct doctrine of a court of equity. And applying it to the present case, Mrs. Nesbit was the owner of the house and lot to all intents and purposes on the nineteenth day of July, one thousand eight hundred and forty-five, when the fire occurred, although not yet vested with the legal title.

Not having effected any other insurance after she became thus the owner, and although she did not stipulate in her contract for an assignment of the policy then covering the house, yet, in equity and as a matter of practice between her and her co-tenants, she ought to have the benefit of the policy. And this court, having still the control of the proceedings in this partition suit and of the sale made under its decree, can regulate this matter between them and compel justice towards each other.

It is inequitable and unjust that these parties, Mary and Elizabeth Smith, should undertake to withhold from Mrs. Nesbit the benefit of the policy of insurance, provided she pays, as they require her to do, the full price at which she bought the property with the house standing. They make a motion to compel her to complete the purchase, and yet seek to deprive her of the value of the house. Can they expect her to pay what she bid for the property, and receive for themselves, in addition, the full value of the buildings which have been actually destroyed?

There seems to me a clear, natural equity to the contrary; and I consider that it is competent for the court, while it has the subject matter of this sale under its charge, to direct what they shall do to carry the sale into effect without injustice to any party. Mary and Elizabeth Smith must be made to do

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whatever is in their power to do in order to give Mrs. Nesbit the full benefit of the policy of insurance. If they cannot, as the matter now stands, conscientiously make their affidavit of interest in the premises insured at the time of the loss by fire, so as to satisfy the terms of the policy and enable the claims for loss to be properly made, the court, by its order, can easily restore them to that interest by reducing the purchase money to be paid by Mrs. Nesbit from eight thousand five hundred dollars to six thousand dollars. This will give them an interest in the insurance money, which is two thousand five hundred dollars, to make up the full price that Mrs. Nesbit was to pay.

If, after the necessary preliminary proofs are furnished, a suit on the policy shall have to be brought, they must give their authority or consent to be plaintiffs in such suit, being indemnified; and should the claim upon the policy fail and the money not be recovered without any fault of Mary Smith and Elizabeth Smith, I do not see after all but the loss of the building will have to be borne solely by Mrs. Nesbit as the purchaser and owner, and she will ultimately be obliged to pay the whole purchase sum of eight thousand five hundred dollars.

Ordered, that the defendants, Mary Smith and Elizabeth Smith, unite with the complainant, Martha Gates, and the petitioner, Ann Nesbit, in authorizing and empowering Stephen Cambreleng, Esquire, one of the masters of this court, to settle and adjust with the East River Mutual Insurance Company in the city of New York, and to claim, collect, and receive from the said company the loss occasioned by the destruction by fire, on the nineteenth day of July last past, of the two story brick front house and brick addition in the rear, known as No. 15 Beaver Street, corner of New Street, New York, which said buildings were insured by the said company against loss or damage by fire, by their policy dated, &c., in the names of the above mentioned, &c. And, for that purpose, that the said defendants, Mary Smith and Elizabeth Smith, duly execute such written authority, to be approved by the said Stephen Cambreleng, as may be necessary to be executed by them; and that they make the necessary and proper affidavit or affidavits and statement of the loss which may be required, and which the said Stephen Cambreleng shall advise to be proper, to enable him to

Agent's Authority. — President's.

claim, collect, and receive the amount of loss upon the said policy of insurance from the said insurance company. And it is further ordered that, on the receipt of the money from the said insurance company, the said master make a report thereof to this court, to the end that this court may then proceed to determine the rights of the parties to the said fund, and how the same shall be disposed of. And it is further ordered that all other questions and all further directions on the said petition and the opposing affidavits be reserved until the coming in of the said report.

HACKNEY vs. THE ALLEGHANY COUNTY MUTUAL INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, September Term, 1846.)

Agent's Authority. — President's.

In an action by a mutual insurance company on a premium note, *held*, that declarations of an agent of the company as to when the company would take risks were not admissible in defence. *Held*, also, that similar declarations of the president of the company to the agent, at the time of his appointment, were not admissible.

THE case is fully stated in the opinion of the court.

Thompson, for the plaintiff in error.

Parson & Williams, *contra*.

BURNSIDE, J. This was an action of assumpsit on a premium note, dated the 9th of December, 1844, by which the plaintiff in error promised to pay the Alleghany County Mutual Insurance Company the sum of \$96, in such portions and at such times as the directors of the company may, agreeably to their act of incorporation, require. The destructive fire in the city of Pittsburgh, on the 10th of April, 1845, exhausted all the funds of the company. They required payment of all their insurance notes. On the 3d July, 1844, the company constituted Z. H. Eddy their agent, by the following certificate, viz.: —

“This certifies that Z. H. Eddy, of Warren, Warren County, Pa., is appointed an agent of the Alleghany County Mutual Insurance Company, and is authorized to receive applications for

¹ 4 Barr, 185.

insurance, and the premiums thereon, on which application a policy will issue, or the money be immediately returned.

“ L. WILLIAMS, *President*.

“ Dated, Warren, July 3, 1844.”

After the plaintiff had closed, the defendant proposed to prove that, at the time the agent requested him to become a member, the defendant was assured that the company was not insuring in the city of Pittsburgh, or other large cities; and that the defendant said, if such is the case I will become insured and a member of said company, and gave his deposit note accordingly. The evidence was objected to and overruled by the court, and defendant excepted. He then offered to prove that, at the time the president appointed Mr. Eddy agent for the company, he said they would not or did not insure in the city of Pittsburgh; that the company was intended for the country and not for the city of Pittsburgh, and that the agent so represented to the defendant at the time of giving the note in question and becoming a member of the company, and it appearing by the evidence that the company did, at the time and afterwards, insure in the city of Pittsburgh. This offer the court also rejected, and sealed a bill of exceptions.

The errors assigned were to the rejection of the evidence in these two bills of exceptions. They were considered together by the counsel, and will be so considered by the court.

The act incorporating The Alleghany County Mutual Insurance Company, passed the 4th of April, 1844, Pamphlet Laws, 194, declared that all persons who shall insure with said corporation, their heirs, executors, administrators, and their assigns continuing in the corporation, shall thereby become members thereof during the period they shall remain insured. The act provides that the affairs of the company shall be managed by a board of *thirteen* members, and requiring a majority to constitute a quorum for the transaction of business.

The directors determine the rates of insurance, and the time to be insured, and the sum to be deposited for the insurance. Each person becomes a member of the corporation on receiving his policy and depositing his premium note for the sum determined by the directors.

Eddy was the agent of the company for the special purpose

Agent's Authority. — President's.

to receive applications for insurance, and the premium thereon. On these applications the board of directors judged and decided whether a policy should issue. This corporation, acting within the limits of the power conferred by the act of incorporation, is responsible for the acts and contracts of their agent within the scope and authority of such agents. 12 Wheaton, 40; 6 Condensed Rep. 425; 5 Watts & Serg. 548. The declarations of such agent, acting as such within the scope of his authority, are evidence against the company. 5 Watts, 39. But the evidence offered was not within the scope or authority of either the agent, Eddy, or the president of the company. What authority had Eddy to bind the company whether they would insure in one place or another? Whether they would insure in town or country? His duty was to receive applications and premiums, and beyond that he had no power to bind the company. Nor was the declaration of the president, when he appointed Eddy, within the scope of his duties. The board of directors decided where they would insure. A large portion of the insurances within the city of Pittsburgh was made after the plaintiff in error became a corporation [corporator?] and one of the company.

The public have a deep interest in the proper conducting of these mutual insurance companies. There is no such privity among the corporations [corporators?] or the officers of the company as to make the admission of either binding on all. 5 Day, 309. If such verbal conversations were admitted in evidence against the written engagements of the corporations, their policies would be worthless and the utility of mutual insurance companies at an end.

We are unanimously of opinion that the court were right in rejecting the evidence offered.

The judgment is affirmed.

HILLIER vs. ALLEGHANY COUNTY MUTUAL INSURANCE
COMPANY.¹

(Supreme Court, Pennsylvania, September Term, 1846.)

Premium Note. — Set-off. — Remote Loss.

In an action by a mutual insurance company upon a premium note, the defendant attempted to set off a loss occurring to him by the removal of goods from the building insured to save them from an apprehended destruction by fire; though it appeared that the fire had not touched the goods or the building containing them. *Held*, not a proper case for set-off.

THE case is fully stated by

GRIER, J., in his report of the trial below, which was as follows: This is an action brought by the Alleghany County Mutual Insurance Company against Thomas A. Hillier on his premium note of \$160, given for insurance of defendant's stock of looking-glasses and furniture in his house in Wood Street, on which five per cent. was paid at the time of insurance.

Owing to the losses sustained by the company from the fire of the 10th of April last, the company have made calls on the members for the balance due on their notes, and the additional one per cent. according to the form of the charter, and now demand the balance of defendant's premium note, \$152, together with one per cent. on \$3,200, the amount insured, viz., \$32.00; in all the sum of \$184, with interest from the 10th of July, 1845.

The defendant claims to set off \$100 on account of injury sustained by the removal of his goods from the building at the time of the great fire in April, 1845. His house was not on fire, nor were his goods injured directly by the fire, but the fourth house from his was at one time on fire, though afterwards the fire was extinguished, and there was a reasonable ground for apprehension that his house would be consumed in that terrible conflagration, such as would justify the precaution of removing his goods to save them from the fire.

On these facts two points have been submitted to the court.

1. Whether the injury thus sustained by the defendant's

¹ 3 Barr, 470.

goods is a loss within the policy, for which he has a right to claim contribution from the plaintiffs; and,

2. If it be, whether it can be set off in the present action, it being admitted the company is wholly insolvent, and the amount of its funds insufficient to pay its losses.

By the policy of insurance, the plaintiffs covenant to settle and pay to the defendant all loss or damage, not exceeding in the whole the said sum of \$3,200, which shall or may happen to the aforesaid property by means of fire during the time this policy remains in forec.

Can it be said that the defendant's goods in this case have suffered damage by means of fire? I think not. His goods were not burnt; they were not injured by the fire; the house containing them was not on fire, nor was it necessary to remove them in order to save them from burning, although the removal was but a prudent precaution under the circumstances of the case. Admitting that the insurers would be liable in cases where goods are injured by fire-engines in putting out a fire when the building containing the goods was actually on fire, or by the removal of the goods under the same circumstances, although the goods may not have been burnt, but in fact were injured by water or by breakage in the act of saving them from fire; yet this must be on the ground that the fire is the proximate cause of the injury, and by a liberal construction of the policy the goods may be said to have suffered damage by means of fire; and I believe it has been the custom of insurers to pay losses incurred in such cases. But in the present case the fire, though it may be said to be the remote cause of the injury, the *causa causans*, it cannot properly be called the proximate cause. The property was not on fire, neither the house which contained it, nor were the goods injured by endeavors to extinguish the fire, or save them from it. The plaintiffs have not insured against apprehensions of fire, and the injury sustained originated not from necessity to save them from impending fires, but from the prudent anticipation of danger from it.

I have not been able to find any case in point. The case of *The City Fire Ins. Co. v. Corliss*, 21 Wend. 367, cannot be construed as an authority against my present position; in that case the goods insured were destroyed by the house being

blown up by the city authorities to stop the great fire in New York, and to save it and others from being burnt, as it otherwise certainly would. But the insurers in that case were held liable because fire was the proximate cause of the loss, for the court there say, The company agrees to make good unto the assured all such loss or damage unto the property as shall happen by fire. Thus far there is no limit to their undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, which is not pretended in this case, it matters not how the flame was kindled, whether it be the result of accident or design, whether the torch be applied by the honest magistrate or the wicked incendiary, whether the purpose was to save the city as in New York, or the country as at Moscow. And I may add, whether the fire be applied to gunpowder in the basement, or by a burning shingle on the roof. Hence it has been held, that the insurers are liable where the house has been burnt by the negligence of servants, or of the owners, because the fire is the proximate cause of the loss, and the negligence but the remote cause. See *Walker v. Maitland*, 5 Barn. & Ald. 174; *Busk v. Assurance Company*, 2 Barn. & Ald. 73; *Walers v. Insurance Company*, 11 Peters, 222; *Patapsco Insurance Company v. Coulter*, 3 Peters, 222; 10 Peters, 518.

Nor can this case be compared to those cases in marine insurances, where, to escape from some imminent peril that is insured against, it is necessary to cut away the mast or cable, or throw overboard a part of the cargo, or to cases of general average from jettison, &c. This doctrine is founded on the necessity of a sacrifice of a part in an imminent peril to save the remainder, and is an act beneficial to the insurer. This doctrine might apply to cases of injury necessarily inflicted on property in extinguishing the fire, but cannot apply to accidental injury to goods insured from a removal of goods as a precaution against injury by an apprehended fire.

The decision of the first point being conclusive of the case, an opinion on the second is not necessary. But I think the point, also, is against the defendant. By the peculiar constitution of mutual insurance companies, the insured are also the insurers. If the company be insolvent, and their whole means are insufficient to pay all their losses, their whole fund must be

collected and fairly apportioned according to their legal parity or by equitable apportionment. This could not be done if set-off were permitted.

Let judgment be entered for plaintiffs for the sum of \$184, and interest from 10th July, 1845, \$8.50; in all \$192.50.

Laying & McCandless, for the plaintiffs in error.

Williams, contra.

GIBSON, C. J. Insurers are answerable for direct and immediate, not for consequential and remote losses from a peril insured against. When that is fire, the instrument of destruction must be fire. On no other principle than that the character of the loss is determinable by the proximate cause of it, could the insurers have been held liable for the loss of the Dutch ship mentioned in *Marshall on Insurance*, p. 421, as having been burnt by the Spaniards at Majorca, in consequence of an apprehension that the crew were infected with the plague. An inversion of the rule would have made them liable only in case the plague had been one of the perils mentioned in the policy. It would also have protected the insurers in the *Patapsco Insurance Co. v. Coulter*, 3 Peters, 222, from liability for the loss of the ship burnt by the negligence of the captain and crew. But the converse of the rule which charges the insurers with a loss of which the particular peril is the proximate cause, exempts them where it is the remote one; and this rule is a part of the general law of insurance, though I confess I have seen no application of it to any other policy than a marine one, except *Austin v. Drewe*, 6 Taunt. 436, which, however, comes entirely up to the point. In that case it was determined that a loss from heat without ignition in a process of manufacture, was not covered by a policy against fire. But there would be no certainty in the contract were it expounded by anything else; for it would often be impossible to determine how far remote causes were influential in bringing about the disaster. Now, neither the stock of goods in the defendant's policy, nor the house which contained it, was touched by fire; but the goods were damaged in the removal of them, under a reasonable apprehension that they would be reached by the flames which had caught one of the houses in the same block. On this plain ground, there was a failure of the defence in point of merits.

 Insurable Interest.

The decision of the question, whether it could have been set off in this action on the defendant's premium note had it been found, would also have been against him. Such a defalcation might work no injustice in ordinary circumstances, especially if all the members of the association were insolvent; for there would be enough in hand to pay the current losses. But in a time of overwhelming disaster, such as occurred when the fire in question laid a third of the city in ashes, it would work most unjustly, by enabling a member who stood in the double relation of debtor and creditor to get more than his share of the insolvent fund. Where the company is bankrupt, either member is entitled to payment, not for his whole loss but for a part of it in the proportion which the amount of all the losses bears to the amount of the joint effects. If the fund is sufficient to pay ten per cent. all round, he is entitled to recover ten per cent., but by defalcating his entire loss, he might in effect perhaps receive twenty. Nor could he set off his loss *pro tanto*. It is to be remembered that each sufferer is an insurer as well as an insured; and that he is bound to make compensation, as well as entitled to receive it. But it is not perceived how the *pro tanto* amount of his loss could be ascertained before all the available securities of the company had been called in, and the demands upon it liquidated. The plain and practicable plan of settling the affairs of an insolvent company of mutual insurance, is to liquidate its means and its responsibilities separately. In this respect also the defalcation would fail.

Judgment affirmed.

 HOWARD & RYCKMAN vs. THE ALBANY INSURANCE COMPANY.¹

(Supreme Court, New York, October Term, 1846.)

Insurable Interest.

Two persons, jointly owning certain property, caused an insurance of it to be effected in their joint names. Subsequently, and before loss, one of them conveyed his interest in the property to the other. After a loss had occurred an action was brought on the policy in the joint names of the two persons. *Held*, that they could not recover. BRONSON, C. J., dissenting.

¹ 3 Denio, 301.

Insurable Interest.

The case is sufficiently stated in the head-note and in the opinion.

S. Stevens, for the plaintiffs.

D. Cady & M. T. Reynolds, for the defendants.

BRONSON, C. J. When the assured has no interest at the time the contract is made, the policy is a mere wager, in which one party stakes the sum insured, and the other the premium paid upon the happening or not happening of a particular event. Whether such a contract would be good at the common law, we need not inquire, for it would clearly be void within our statute against gaming. 1 R. S. 662; 8 to 10; 3 Kent, 277, 278. But when the assured owns the property at the time the insurance is effected, a subsequent transfer of his interests cannot render the policy void. The contract will be of no value to the assured, for the reason that there is no longer anything upon which it can operate; but the subsequent transfer cannot infuse any vice into that which was originally a valid agreement. I agree that in fire policies the assured must have an interest at the time of loss, as well as when the contract is made. *The Saddlers' Company v. Badcock*, 2 Atk. 554; *Lynch v. Dalzel*, 3 Bro. P. C. 497; 3 Kent, 371. And so, if he has parted with all his interest before the loss happens, he cannot recover. But he does not fail on account of any vice in the contract, but for the reason that he has sustained no loss or damage.

Now in this case, if the plaintiffs, before the fire happened, have parted with one half, or any other share of their interest in the property, they could not recover anything on account of that share; because as to that, they would have sustained no loss or damage. But I see no reason why they might not recover in respect to their remaining interest in the property. The cases of *Reed v. Cole*, 3 Burr. 1512, and *Stetson v. The Massachusetts Ins. Co.* 4 Mass. 330, go upon the principle, that although the assured has assigned a part of his interest in the subject, he may still recover so long as he has any remaining interest, and I think that is sound doctrine. It is proper to notice in relation to this contract, that although there is a condition which renders it void in case the *policy* is assigned without the consent of the company; see *Smith v. The Saratoga Company*, 1 Hill, 497;¹ there is nothing concerning an assign-

¹ *Ante*, p. 97.

ment either general or partial, of the *subject* insured. As the parties have not declared what should be the effect of such an assignment, the question must be settled upon general principles; and I am not aware of any rule of law which will deprive the assured of an action altogether, because he has assigned a part of his interest in the property. If he is confined, as he must be, to an indemnity for the loss and damage which he has actually sustained, there is then nothing in the case in the nature of a wager, or which is contrary to good morals. Nor is the insurer injured. On the contrary, he is relieved from the burden of his undertaking to the extent of the assigned share. He is not bound to indemnify the assignee, because he has not agreed to do it. But he has agreed to indemnify the assured; and his loss and damage, whether total or only partial, must be made good.

If Ryckman had assigned his share to a stranger, it would have made substantially the same question as the transfer of an equal amount of interest by both of the plaintiffs. The company would not in that case be answerable beyond the share owned by Howard; but to the extent of that share, I think they would be liable. True the agreement was, to make good and satisfy unto the plaintiffs all such loss or damage as might happen by fire to *their* property; but it would be a narrow, and I think an improper interpretation of the contract, to say that it came to an end when the plaintiffs ceased to have a *joint* interest. We have not been referred to any case which asserts such a doctrine; and the general rule is, that contracts of insurance should receive a liberal construction for the attainment of the ends which the parties had in view. If the joint interest had terminated by the death of one of the plaintiffs, I cannot think that the policy would have ceased to be obligatory on the company; nor should such a result follow from a determination of the joint interest by the voluntary act of one of the parties. The policy says nothing, in terms, about a joint interest in the plaintiffs. The building with its contents are only mentioned as *their* property, for the purpose of identifying the subject to which the policy applied.

If an assignment by Ryckman to a stranger would not have defeated the action so far as relates to the interest of Howard,

it is quite clear that the assignment from Ryckman to Howard cannot have that effect.

I think the plaintiffs can recover on account of the interest which Howard originally had in the property; but the recovery cannot go further, and include damages for the interest which Ryckman assigned to Howard. As to that, it is the same thing, in effect as though Ryckman had assigned to a stranger. If the promise had been, in so many words, to indemnify the plaintiffs jointly and *severally* against loss, it would only have reached such interests as they then had; and not such as they, or either of them, might subsequently acquire.

This case is certainly not free from difficulty. But I think there may be a recovery on account of the interest which Howard had in the property at the time the contract was made, because that interest continues until the loss happened. But there can be no recovery on account of the interest which Ryckman had in the property at the time the contract was made, because he had parted with that interest before the loss happened.

If there can be a recovery to any extent, the action must of course be brought in the name of both the plaintiffs. A policy of insurance is a mere chose in action, which is not assignable, so as to pass the legal interest. *Jessel v. The Williamsburgh Ins. Co.* 3 Hill, 88. In the case to which we are referred, *Ferriss v. N. American Ins. Co.* 1 Hill, 71, the policy was made assignable, so as to pass the legal interest to the assignee by the express terms of the statute; and having the legal interest both in the subject and the policy, we held that the suit must be brought in the name of the assignee. There is another case to the same effect: *Mann v. The Herkimer Ins. Co.* 4 Hill, 187. And besides, although Ryckman assigned his interest in the *subject* to Howard, it does not appear that he assigned the *policy*. There is no ground for saying that there has been a misjoinder, either of counts or of parties.

Such are my views of the case. But my brethren are of opinion that the plaintiffs cannot recover any portion of the loss because they had no joint interest in the property at the time the loss happened. The result is, that there must be

Judgment for the defendants.

Chancery Jurisdiction.

CARPENTER vs. THE MUTUAL SAFETY INSURANCE COMPANY.¹

(Chancery, New York, December, 1846.)

Chancery Jurisdiction.

The court of chancery has jurisdiction to compel a specific performance of an agreement to execute a policy of insurance, or to compel payment in case of loss.

THE complainant alleged that the defendants had agreed to insure his property; that the premium had been regularly paid, but no policy had been issued, and the property insured had been destroyed by fire, within the terms of the agreement. He prayed that the defendants might be compelled to pay the sum agreed upon. Demurrer to the bill.

W. C. Noyes, for the complainant.

T. Sedgwick, for the defendants.

THE VICE-CHANCELLOR. The circumstance that the bill seeks performance of a contract relating to personal property, is not of itself a valid ground of demurrer. There are many instances in which equity compels a specific performance of such contracts.

The real, serious objection to the bill is, that the complainant has an adequate remedy at law. I think, however, that it is now the established doctrine, that the insured may in such a case resort to a court of equity.

In *Perkins v. The Washington Insurance Company*, 4 Cowen, 645, our highest court maintained a suit like this in all respects. The defendant there was a corporate body, which answers under its seal and makes no discovery.

It is true that the report of the case does not show any discussion of the question of jurisdiction in the court below, or that the point was presented. But the severe litigation of the cause, the eminent counsel engaged in it, and the opinion of Senator Colden, furnished strong evidence that the law was deemed to be too well settled to warrant any debate in regard to it. That learned judge says, in his opinion (p. 661), that the receipt for the premium "answers all the use of a policy, except that the latter authorizes the assured, in case of loss, to

¹ 4 Sand. Ch. 408.

Chancery Jurisdiction.

sue in a court of law, instead of being obliged to resort, as in this case, to a court of chancery."

The case cited has ever since been regarded as decisive of the jurisdiction in equity. Thus the new chief justice, in delivering the opinion of the supreme court, in *Lightbody v. The North American Fire Insurance Company*, 23 Wend. 18, 25, speaking of a state of facts similar to those in this bill, says: "If his remedy at law was questionable" (and the judge thought he had such a remedy by an action on the case), "he had a perfect equitable right to the delivery of the usual policy, which he might have enforced in the proper forum;" citing *Perkins v. The Washington Insurance Company*.

Mr. Phillips, in his *Treatise on Insurance*, cites the same case, and observes that upon the general principles distinguishing the jurisdictions, it belongs to courts of equity to compel a specific performance of an agreement to make or renew a policy of insurance. 2 Phill. on Ins. 582.

So Mr. Duer, in his recent valuable work on *Marine Insurance*, says the acceptance of an application, with the rate and the time agreed upon in writing and signed, constitutes in equity a valid insurance, and in law a valid agreement to insure; and gives to the assured an immediate right to demand from the insurer a corresponding policy on the tender of the premium or the premium note; and should a loss occur before the execution of the policy, a court of equity would relieve the assured. 1 Duer on Ins. 66, chap. 1, § 11. He adds in note 7 (Ib. 111), that *Perkins v. The Washington Insurance Company* is a direct authority in support of the position in the text, that a court of equity upon a bill for the specific execution of an agreement to insure, may decree a satisfaction.

In *Mead v. Davison*, 3 Adolph. & Ellis, 303, Lord Denman, speaking of a similar case, said that equity would have compelled the insurer to execute the formal policy, whenever tendered to him.

With these authorities, and I may add, the very general understanding of the profession for a long period that such is the law, I have no doubt as to the jurisdiction in this case. It surely can make no difference in respect of the jurisdiction, that the loss insured against has occurred. The only ground

Increase of Risk.

upon which it can be maintained is for a specific performance by the execution and delivery of a policy. The further relief by decreeing payment, where there has been a loss, is merely incidental, and to avoid expense. Now take the instance of an agreement to insure, where there has been no loss. The right of the assured to receive a policy is perfect and may be enforced immediately, the premium having been paid. An action at law in such a case would be worse than useless to him, for he could recover no more than nominal damages. The value of a policy, previous to a loss, would not be sufficient to carry the costs of a suit at law.

In this respect it is wholly unlike the contract to deliver bills or notes payable at a future day, on a sale of goods. There, on a failure to deliver the bills or notes, an action lies upon the special agreement, in which the damages may be at once ascertained, and full justice done, by giving the price of the goods sold. Here, after a barren recovery at law for the non-delivery of the policy, if a loss occurred, another suit must be brought for the real damages; and in the second suit, the assured would probably encounter a plea setting up the first recovery as a bar to a further prosecution.

It is obvious that a suit at law, before a loss, is an inadequate, if not a fatal mode of redress. And as I have remarked, the principle of the jurisdiction in equity is the same whether a loss has occurred or not. It therefore cannot be taken away or impaired, if perchance the remedy at law, when first invoked after a loss, may lead to the same results.

The demurrer must be overruled with costs, and the usual order entered.

JAMES BOATWRIGHT *et al.* *vs.* THE ÆTNA INSURANCE COMPANY.¹

(Court of Appeals, South Carolina, February, 1847.)

Increase of Risk.

The general principle of the law of insurance, is, if the risk be materially increased by the act of the insured, and it cancels the loss, that avoids the policy.

Where in a policy of insurance, a specification of hazards is followed by a provision that

¹ 1 Strob. 281.

Increase of Risk.

any increase of risk, within the control of the insured, shall vacate the policy; this provision is not restricted by the previous specification so as to make the insurer a special contractor under the specification.

The meaning of words is to be restricted and directed by the subject matter of which they are used.

TRIED before Mr. Justice Butler, at Charleston, May term, 1846.

This was an action on a policy of insurance of certain buildings in Columbia, particularly described in the policy, including two kitchens of wood and shingles, one and a half stories high. Policy dated the 12th November, 1842. Amount insured, \$5,000. Renewed for one year 11th November, 1843. On the 29th September, 1844, the buildings were destroyed by fire. The defendants resist payment for the loss, on the ground that the plaintiffs had committed a breach of the terms of insurance. The premises were in possession of David Ewart, and he had, about two weeks before the fire, built an oven in one of the kitchens, and put up a frame, and hung up a quantity of meat upon that frame, and made a fire in the oven, and kept it up to supply smoke for the purpose of curing the meat. The fire which destroyed the premises commenced in this kitchen.

A model of the building was produced and witnesses examined as to the circumstances of the fire, the changes which Mr. Ewart made in the premises, and the increase of the risk.

The material parts of the policy are as follows:—

“And it is agreed and declared to be the true intent and meaning of the parties hereto, that in case the above mentioned premises shall at any time after the making, and during the continuance of this insurance, be appropriated, applied, or used to, or for the purpose of carrying on or exercising therein any trade, business, or vocation denominated hazardous, extra hazardous, or included in the memorandum of special rates in the conditions annexed to this policy, or for the purpose of storing or vending therein any of the articles, goods, or merchandise, in conditions aforesaid denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing and added to, or indorsed on this policy, then and from thenceforth, so long as the same shall be so appropriated, applied, or used, these presents shall cease, and be of no force or effect.

Increase of Risk.

"And it is moreover declared, that this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligation of the parties hereto in all cases not herein otherwise specially provided for."

In the conditions is a classification of hazards, with a long enumeration of goods not hazardous, extra hazardous, and goods insured at special rates, but nothing of bacon and smoke house. Then follow conditions of insurance, and the following clause on which the defendants rely: —

"If after insurance is effected either by the original policy or the renewal thereof, the risk be increased by any means within the control of the assured, or if such buildings and premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such assurance shall be void and of no effect."

The plaintiff contended that the clause should be considered in connection with the foregoing enumeration of goods and trades deemed hazardous, extra hazardous, and the subject of insurance of special rates. But his honor instructed the jury that any change by which the risk might be materially increased was sufficient to avoid the policy.

The jury found for the defendants, and the plaintiff appealed for a new trial on the following grounds: —

1. That his honor instructed the jury, that the general words respecting the increase of risk were not to be construed or controlled by the preceding specifications of employments and matters deemed hazardous.

2. That the verdict is not supported by the evidence in the case.

Petigru, for the motion. Risks increase and decrease involuntarily by every change of habit or weather. Shall one be bound down to the temperature of the time of insurance? The prohibited articles and trades are enumerated, and that by which the loss accrued is not among them. General words must be qualified, or the previous special words are vain and of none effect. 8 Coke, 155. Specifications must control the general words. 1 Mod. 69; 4 Maule & Sel. 427; 4 Cruise on Construction of Deeds, 434; *Cook v. Oakley*, 1 P. Wms. 302.

Increase of Risk.

The general word *thing*, following the specific articles mentioned, shall be considered as confined to articles *ejusdem*, of the same kind.

Memminger, contra. There is a difference in the law of insurance between warranty and representation. A warranty is a written stipulation, required to be strictly complied with; a representation, to be substantially complied with. *De Hahn v. Hartley*, 1 T. R. 343; *Pawson v. Watson*, Cowper, 787; *Blackhurst v. Cockell*, 3 T. R. 361. The object of policies is to bring the specification under the warranty. A policy may be vacated by a change from the more dangerous to the less dangerous trade; it changes the contract. Representations are to be proved by the insurer; specifications show for themselves. Whatever increases materially the risk, vacates the policy and discharges the underwriters. 1 Phil. on Ins. 347; *Ib.* 410. There is no difference in the construction of marine and fire insurances. In this case there was a breach of warranty. Any writing on the paper, or attached to it, or in the margin, is a warranty. 1 Phil. on Ins. 347; *Routledge v. Burrell*, 1 Hen. Bl. 254; *Worsley v. Wood*, 6 T. R. 710. None of the special rates trades are indorsed on the policy, and this *itself* discharges the policy. When provision is made against the operation of the specific words, they are not to control. The general words in this case are intended to cover all articles or trades not specified, and are not inconsistent with the specifications, nor intended to exclude them. Fire heat is necessary in a smoke house, and it should have been indorsed on the policy. What is not included in the warranty, is left to be controlled by the general law of insurance, and it was so expressed in the policy. Change or enhancement of risk discharges the insurers from any subsequent loss. 1 Phil. on Ins. 573. The specified risks were to be considered as vacating the policy, if incurred; those not specified are the subject of proof and discussion.

Petigru, in reply. This is not a case of warranty, but a case of conditions. The house was still a kitchen, though used to smoke meat. There is no greater risk in smoking meat than in cooking it. Ovens are necessary for culinary purposes, and this smoke was in an oven. According to the argument in this case, putting out the fire destroys the kitchen. *Expressio*

Increase of Risk.

unius, exclusio alterius. It is agreed what shall avoid the policy ; let them abide by the agreement. A man must sue according to the contract, and abide by it. Is the specification to enure to the benefit of the insurer and not equally to the insured ? *Routledge v. Burrell*, 1 Hen. Bl. 254. In this case, even after the meat had been smoked and put away, if the kitchen had been burnt, it could be dated back to the time of smoking, which would be absurd. The jury were afraid to appear too much prejudiced against the corporation, and decided the other way.

RICHARDSON, J., delivered the opinion of the court. If the judge was correct in his instructions to the jury, then after the finding of the insurers, under the evidence of the facts and the actual occurrence of the fire, it is not to be questioned that building the smoke house within the kitchen, and the use made of it, so increased the risk as to avoid the policy by the general principle of the law of insurance.

The established principle is, that if the risk is materially increased by the act of the insured, and it causes the loss, that avoids the policy. See 1 Phil. on Insurance, 573. No underwriter has ever been held, &c., to be answerable for losses, directly and evidently occasioned by the fault of the assured himself. *Ib.* 224.

This rule is familiar in marine insurance, in cases of wilful deviation from the voyage insured ; *Park*, 17, 294 ; and in insurance against fire, in case of mismanagement caused by loss. 6 T. R. 710 ; 6 Taunt. 436. This is the law in such cases of loss. The question is upon its application. (I have not meant to say that the mere erection of the smoke house, or even the use of it, would avoid the policy, whether it caused the loss or not, as would seem to be the letter of the condition. That question need not be decided in this case.)

But having laid down the rule of law, when the risk had been materially increased by the insured, I proceed to the proper question of the case, to wit : whether this general principle of insurance law can be applied to the particular policy before the court. The distinction which is urged to take this case out of the general rule, arises out of what is called in the policy, the classification of hazards and the conditions of insurance, both of which are appended under their respective titles or heads.

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The classification enumerates specifically and carefully: 1st, goods not hazardous; 2d, goods, trades, &c., deemed hazardous; 3d, those considered extra hazardous; and 4th, those to be insured at special rates of premiums. After such classifications come what are called conditions of insurance. These conditions first specify several prerequisites before the policy will be given; and secondly, after the policy is executed, certain conditions are set forth which may render the policy void.

The particular conditions not to be considered are as follows: "If after the insurance is effected, &c., the risk be increased by any means within the control of the assured, or if such buildings, &c., shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

The case turns upon the construction and effect of this condition. The argument for a new trial is, that the terms, "if, &c., the risk be increased by any means within the control of the assured," can mean no other than the hazards specified so carefully in the express classifications of hazards, *expressio unius est exclusio alterius*. And inasmuch as a smoke house cannot be included under any of the many specifications of hazards, the structure and use of it and consequent loss by fire do not avoid the policy, even though the risk was increased; i. e., this risk is not to fall under the general rule of law first laid down, but is to be construed by the terms of the policy, considered as a special contract, which the insurers might make, and thereby renounce the general rule of law in their favor.

This argument couples the specification with the sweeping condition just quoted; and it is very clear that a general proposition, with an enumeration of particulars, will limit its generality and confirm its meaning to the particular enumeration. For instance, if A. sell to B. all his cattle, bulls, cows, oxen, steers, and calves, the term cattle, although generally including all the domesticated beasts of pasture, will be confined to the particular enumeration made of A.'s bovine stock, and B. could not claim his sheep, goats, &c., although they, too, be cattle. But I do not conceive that the construction would have been obviously the same if the sale had been of all A.'s bulls, cows, oxen, steers, and calves, and cattle, which would be nearer a parallel to the present case.

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But to return ; this is equally a rule of sound logic as of law. The law maxim is, that the meaning of words is to be restricted and directed by the subject matter of which they are used. This maxim is in daily use among men. But the whole object is to expound the just and true meaning of parties to contracts. In the policy before us, after the enumeration of many hazards, which, if practised within the houses insured, *ipso facto* avoid the policy, "so long as the premises shall be so appropriated, applied, or used ;" then there follows, but under a distinct substantive head, entitled "Conditions of insurance," the important condition, after the "insurance is effected," if the risk be increased, &c., by the assured, the policy to be void. This condition provides literally for avoiding the policy, in the event of any increased hazard whatsoever, if introduced by the insured, and would seem to be intended to preserve for the insured the rule of law first noticed, and in order to prevent the very construction of the policy that has been made against them, by reason of their astute care, so to put the insured upon his guard. But the condition, I would say, is equally for themselves to avoid cavil, upon their reserved legal rights, under established insurance law, and lest these rights should be implied away and excluded by the minute specifications. What reason can be found for swerving from the literal and plain import of the condition, which at the same time preserves a fundamental, if not indispensable, law of insurance, that protects the insurer against the conduct of the insured in increasing the risk. Insurance against the misconduct of agents is frequent, but possible misconduct of the insured himself is at the foundation of the general law applied to this case ; for if you make the insured liable in this case, their insurance becomes in effect an assurance against the errors or the misconduct of the insured himself, which would be inconsistent and absurd.

For these reasons, this court concurs in the opinion of the presiding judge, and the motion is refused.

Reparation.

R. D. MENZIES, pursuer, vs. NORTH BRITISH INSURANCE COMPANY, defenders.¹

(Court of Session, Scotland, February 13, 1847.)

Reparation.

Held, that an insurance on buildings against fire does not, without special stipulation, cover consequential damage arising from want of occupancy during the time when the premises are under repair in consequence of fire; nor loss of profit that might have been made by the occupant by his trade, in the subjects during that period; nor wages of servants engaged on the premises, and which the occupier was bound to pay to them, though, in consequence of the destruction of the property, he received no return in service for such wages: and *held*, further, that this general rule was confirmed by a specialty in the policy of insurance, which gave the insurance company the option, either to pay the loss in money or to rebuild and repair the premises, which implied that the kind of loss for which the company was liable, was one which could be compensated by rebuilding and repairing.

ROBERT D. MENZIES, the pursuer, was proprietor of premises at the shore of Leith, which were used partly as steam-mills for grinding corn, and partly as grain lofts; and they were also fitted up with hot and cold baths, which were his personal occupancy. Over this property the pursuer granted a bond for £6,000 in favor of Liddell's trustees. He thereafter, in May, 1843, made a proposal to the North British Insurance Company to insure the interest of the trustees on the premises to the extent of £6,100. This proposal was accepted, and a policy issued in favor of the trustees. In the policy "the building" was insured for £1,300, "the millwright work" for £1,300, "the steam-engine and boilers" for £500, "the granaries, baths," &c., for £3,000, making in all the £6,100. One of the questions put by the insurance company, before the policy was issued, was, "Is the mill wholly in the occupation of one tenant or one firm?" and this question Menzies answered in the affirmative.

Thereafter, on 11th January, 1844, Menzies effected another insurance with the defenders for £1,950, "on his interest" in the subjects. The policy narrated that it was an "insurance against loss or damage by fire."

¹ 9 Cases in Court of Session, N. S. 694.

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On his interest in the building of Leith corn-mill	£500
On his interest in millwright work, &c.	200
On his interest in steam-engine and boilers therein	300
On stock in trade therein, his own	150
On stock in trade, in trust for others therein	300
On his interest in building of granaries, baths, &c.	500
	<hr/> £1,950

In the policy there was a clause giving the option to the insurance company to settle for any loss by fire, either by paying money or repairing the premises themselves.

A fire occurred in November, 1844, which partially destroyed the premises. Persons of skill were therefore appointed to ascertain the loss. They reported the total damage to buildings and machinery to be £1,584 17s. 4d., which the insurance company paid to Liddell's trustees. Menzies then made a claim for a loss on "stock in trade," to the extent of £388 8s., which the company admitted and paid under the two heads of his policy for "stock in trade," and which Menzies accepted "to account of loss."

He then raised the present action, concluding for payment of the £500 insured "on his interest" in the building, the £200 "on his interest" in the millwright work, &c., and the £500 "on his interest" in the granaries, baths, &c. He averred that, in consequence of the fire, he had sustained loss in regard to all these items to a greater extent than these sums. He stated that the premises were worth £425 or £430 of yearly rent; but he, at the time of the fire, was in the personal occupancy of them. The baths produced a profit of £430 yearly, and the corn-mill and granaries of £300. But the premises were rendered unprofitable to the pursuer for six months, and his loss, therefore, consisted of the rent, the profits he might have made, and £191 1s. of wages, which he was obliged to pay the servants, and for which he could receive from them no recompense, as he had no building for them to work in.

Further, Liddell's trustees "having refused to apply the sum repaid to them under their policy in rebuilding the premises as a mill, the machinery in the premises became useless for the purpose for which it had been erected, and was sold at a consequent depreciation of value, amounting to about £800, or thereby."

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The insurance company refused this claim.

Pleaded for pursuer: The damage here complained of directly resulted from the fire; and when the policy was fairly construed with reference to the interest it was intended to secure, it was effectual to cover the loss for which compensation was demanded.¹

Pleaded for defenders: The damage was consequential merely, and was not covered by an insurance on the buildings and machinery. The contract of insurance, moreover, was merely one of indemnity, and the defenders having paid to Liddell's trustees the full amount of the damage done by the fire to the buildings and machinery, the defenders were not liable in a second payment of damage to the pursuer, under his separate policy.²

The LORD ORDINARY assolized the defenders.

LORD FULLERTON. This, at first sight, seems to be a nice point, but on the authority of that case, *Wright v. Pole*, I do not see any ground for difficulty or hesitation. Two insurances were effected on the pursuer's premises. The first was effected for the bondholders, and was a policy on the buildings and machinery; the second was effected by the proprietor himself, and was on his interest in the buildings. Now, the question comes to be, What is the meaning of the term "interest in the buildings?" Various parties have an interest in these buildings. An insurance was effected by the bondholders, who had an interest in the buildings, but that only was an insurance in so far as their interest is concerned; so that, if loss had been incurred, not covered by the first insurance, that would be a good ground for him falling back upon his own insurance, for an insurance by him on his interest in the buildings is nothing but an insurance on the buildings themselves.

The question, then, just comes to be, Whether this pursuer can claim an interest of a totally different kind? He does not claim that the insurance company should make good the loss to the building, but he demands reparation for loss on account of want of occupancy. Now, I do not see how his loss upon that point can fall within the policy. If he had intended to have thus insured, there should have been a special insurance to that effect. In this view the authority cited is quite conclusive, as it decides the very point.

¹ 1 Bell, Com. 627.

² *Wright v. Pole*, 1 Ad. & E. 621.

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The case is clearer when your lordships look at the terms of the policy, which reserves to the insurance company the right of reinstatement of the buildings; of rebuilding or restoring them to their original condition, instead of paying over the price. That clearly proves that the loss incurred was to be a loss that could be repaired by rebuilding. I could conceive a case where both landlord and tenant insure for their interest in the building, and then a valuation is put on the loss, in regard to which there may be a question as to how it is to be divided; but there can be no question here about any clause of that kind, because the present pursuer was perfectly aware of the settlement made between the insurance company and the bondholders; and the point, therefore, just turns altogether on the meaning of "interest in the buildings," specially described. On the authority of that English case, I hold that the interest in the buildings means his interest in the actual houses and machinery, and that his loss (if any has been sustained by him) is the amount of destruction which the premises have sustained by the fire. If that loss is made good to the other party, with the private knowledge of the pursuer, there can be no further claim on the ground of his having sustained loss of another kind.

LORD JEFFREY. I am of the same opinion. If this case had been open, as Professor Bell imagined, and had not been affected by any specialty in the terms of the policy or by the conduct of the parties, there might have been some nicety and difficulty, but nothing more. It is a great comfort to us to find it solemnly decided by what I hold to be as competent authority as if decided by the supreme court of this country; for, pronounced as the decision was by one of the highest courts in England, and one most familiar with the subject, it is a judgment of as much weight with us as if it had been pronounced by ourselves. That decision solves the present question.

In point of fact, however, there is a special provision in this policy which is destructive of the pursuer's claim. If the person insured as occupant had chosen to describe his interest as occupant *in gremio* of the policy, and if there should be a provision that his claim should be satisfied by the rehabilitation or reinstatement of the premises as they were before, that would

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exclude any claim for anything more than the expense of the reinstatement. Now, look at the real state of the matter here. There is first an insurance of the bondholders to the extent of £6,000, and then the pursuer effects an additional insurance to the extent of £1,500 on his interest. Now he would have an interest in the matter if the premises had been totally destroyed, and the £6,000 had been insufficient to repair them. He would have had an interest to compel a repair of the premises, in order to get the occupancy in due time. If the premises had been totally destroyed, and the sum of £6,000 contained in the policy of the bondholders had been insufficient to restore them, the pursuer would unquestionably have an interest, and would be entitled to fall back on his own policy; but he makes a separate claim in his separate pleas, and which claim has nothing to do with the reinstatement of the premises, — a claim which, on principle and the special terms of this policy, cannot be admitted.

LORD MACKENZIE. I am of the same opinion. It appears to me very clearly that this action cannot be sustained. The second insurance is an insurance upon the pursuer's interest, over and above the first insurance. It was upon any interest he might have in the premises. There is nothing said in it as to occupancy; it merely, in general terms, says "his interest;" and it is in an insurance against loss by fire on his interest in it — his interest on all the particulars in it — on the corn-mill, on the millwright work, thus limiting his interest to these matters, plainly pointing at this, that he had an interest in the actual building. And, accordingly, all that is followed by the clause which your lordships alluded to, that it should be in the power of the insurance company to make reparation by reinstating the buildings to the condition in which they were before. The claims are to be referred to arbitration, if any should be made, but they have the privilege of putting an end to all that by rebuilding the premises within a reasonable time. That makes it plain that this, which was to come in lieu of all claims, referred to a loss which rebuilding and repairing would satisfy. But if it had been, not his interest in the building, but, on the contrary, his interest in the trade or profits arising from the employment of the premises which had been insured,

Damages. — What the Policy covers.

it is clear that the option given to the insurance company to rebuild or repair would be quite meaningless in reference to such an insurance. That option, indeed, clearly establishes the meaning of the words "his interest." If the insurance office have rebuilt, or paid over the funds necessary for that purpose, how can he get the better of the option which was given them to do so? All this makes it clear to me, that the peculiar claim now stated was not contemplated as coming under the policy, and if it had been intended to be so made, there ought to have been a special stipulation to that effect.

LORD PRESIDENT absent.

The court adhered, with additional expenses.

ELLMAKER'S EXECUTORS vs. THE FRANKLIN FIRE INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, March Term, 1847.)

Damages. — What the Policy covers.

The measure of damages, in an action on a fire insurance policy, is the actual damage done by the fire, not exceeding the amount of the insurance.

A policy of insurance upon an unfinished house does not cover timbers to be put into its construction, lying in an adjoining building, though this be also insured.

Rawle, for plaintiff in error.

T. I. Wharton & Scott, contra.

The following was the language of the court upon the points relating to insurance : —

ROGERS, J. We see no error in instructing the jury not to give damages for materials not within the house for which they were designed. It seems to be conceded that the policy extends to work got out for each house, but not put up, provided the work was deposited in the house for which it was designed, and remained during the fire. This is a liberal construction of the policy, and certainly is extending it as far as the assured can reasonably desire. If the assured could recover for the loss of the work designed in this case for the fourth house if it were

¹ 5 Barr, 183; *S. C.* 6 Watts & S. 439, on other points.

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deposited in the third, there would be nothing to prevent a recovery if deposited in any other house or any other place, however remote from the building consumed; there is no limit: but this it is obvious could not be intended, as it would put the insurers in the power of the insured. The price of insurances depends in some measure on the situation of the property insured, and they might not be willing to insure at all, if they were to be answerable both there and for the material intended for the house insured, which were at another place.

The court was right in instructing the jury not to give consequential damages.

In estimating the damages, the jury were to be regulated by the extent of the loss by fire. The only loss or danger within the policy, is that which happens by fire. This, the company bound themselves to make good by paying it, or by restoring the property within a specified time to as good condition as it was in before the fire. If the plaintiff neglected to repair or to pay the sum to make good the loss, the only compensation to which the defendant is entitled, is to recover interest on the amount of the loss. And so the court instructed the jury, in which we see nothing amiss.

Judgment affirmed.

ELI CLARK *et al.* vs. THE MANUFACTURERS' INSURANCE COMPANY.¹

(Circuit Court of United States, Massachusetts, May Term, 1847.)

Parol Evidence. — Agency. — Presumptions. — Warranty. — Representations. — Assent. — Recovery of Premium. — Lamps. — Negligence. — New Trial.

Where a policy alludes to representations which had been made, and which were to be binding, without incorporating them into the contract, parol evidence may be given of them.

What a party does or says by an agent is as binding as if said or done by himself. The doctrine of warranty and representation considered.

Certain facts held competent evidence of the company's assent to the representations referred to in the policy.

It is not material that a misrepresentation of a material fact was not made fraudulently.

¹ 2 Wood. & M. 472.

Parol Evidence. — Agency. — Presumptions. — Warranty. — Representations, etc.

Notice of any material change in the use of the property insured should be given to the company.

In case the policy has not attached after the payment of premiums, the insured, in an action on the policy, with counts for money had and received, may recover, within six years, the amount of premiums paid by him.

If the applicant represent that lamps are not used in the building proposed to be insured, a cotton factory in this case, and the fact is that lamps were suspended and occasionally used there when needed, the policy would not take effect.

Where the risk never attaches the premium must be returned, though there was neglect and even fault in the assured.

The circumstances of a motion for a return of premiums in this case held to amount to a motion for a new trial.

It was ordered that the premiums be returned.

THE case is sufficiently stated in the opinion of the court.

R. Fletcher & T. P. Chandler, for the plaintiffs.

B. R. Curtis, for the defendants.

WOODBURY, J. Among the preliminary questions to be decided in this case is the admissibility of some of the evidence on both sides. But that involves much of the merits, and is not free from difficulty.

The various pieces of testimony as to Stearns's representations are objected to by the plaintiffs, on the ground that they bring their action on the last policy, in which nothing is said of Stearns or his representations, *eo nomine*; and that to prove them and make them binding would be to alter or add to this written instrument. It is certain that a written contract cannot, as a general rule, be varied by parol evidence.

Some of the leading cases on this are familiar, and may be seen in 1 Greenl. on Ev. ch. 15, p. 315; 8 Bing. 244; *Phillips v. Preston*, 5 How. 291.

Their application to policies of insurance as well as other writings, is shown in Duer on Insur. 71; 2 Johns. Cas. 1; *Higginson v. Dall*, 13 Mass. 96; 8 Wend. 160; 8 Met. 348; 2 Cranch, 249.

It is not necessary to multiply references on this general principle, or its application to policies, nor to explain the numerous exceptions which do not affect the present transaction; for the testimony here is offered, not with the design to show representations different from those referred to in the policy, or to add to them, but to show what those were which had thus been referred to.

The policy itself does not profess to embody into it the rep-

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representations which had been made and which were to be binding, but merely alludes to them, and makes their truth a condition precedent to any recovery.

Such references to other matter, written or parol, are very common in deeds, wills, and other contracts, and it is no violation of the contract to prove, either by writing or verbally, the foreign matter thus alluded to. On the contrary, it complies with the contract when doing this, rather than contradicts or waives it. Most of the descriptions or boundaries in deeds are by such references to other deeds or to monuments and other facts, and showing *dehors* the matter thus referred to, is carrying the deed into effect and not altering it. Phil. on Ins. 47; 1 T. R. 343; 16 Pick. 502.

Had certain representations been introduced into the policy, as to the condition of this property, stating in detail how it stood in respect to various items affecting the risk by fire, the presumption would be that these were the representations meant to be referred to in the policy, and others, perhaps, could not be shown. But when none such were inserted in it, as here, and when it is usual not to do it in such instruments, but to place on file such written statements as to particular matters affecting the risk, if the property is at a distance, and sometimes to make them verbally, the policy, in speaking generally of the representations, must of course refer to such, and be intended by both parties to rest upon them as binding. 2 Pet. 47; 10 Ib. 515. They are as if a part of the contract. 2 Denio, 75.

In showing what they were under such a reference, the general rule, not to change a written contract by parol evidence, or to vary it, by other matter not belonging to it, though in writing, cannot be considered as impugned either in form or substance. *Houghton v. Manuf. Ins. Co.* 8 Met. 114; *Emery v. Merchants' Ins. Co.* Ib. 350 [?]; *Foxcroft v. Mallet*, 4 Howard, 353; *Wigram or Extrinsic Ev.* 54, 55; 3 Barn. & Ald. 299; 1 Paige, 291; 20 Pick. 121.

This conclusion rests on this ground, and not on the admissibility of parol evidence to explain a patent ambiguity, or expression, which, from surrounding and connected facts, may have one of two meanings, and which facts may therefore be shown by parol, if the ambiguity or uncertainty be one as to

Parol Evidence. — Agency. — Presumption. — Warranty. — Representations, etc.

facts and not as to law. 1 Story, Eq. Jur. 563; Wigram on Ex. Ev. 176; *Colpoys v. Colpoys*, Jacob, Rep. 463.

The parol evidence is not to contradict the writing, but in such case is consistent with it. 2 Brod. & Bing. 553; 4 Russ. 540.

Another objection to the admissibility of some of the evidence here is, that the representations made by Stearns are not binding on the plaintiff; but it is a well settled principle, that what a party says or does by an agent is as binding as if said or done by himself; and the doings of a person may be adopted or ratified afterwards as if an agent, no less conclusively than if he was authorized beforehand. This is elementary law in every text book on agency. Hence, throughout in this case the bank was the chief, the real principal; and is now. All said or done by others, or in others' names, was said or done in its behalf. The bank was the party in interest here from the start to the close. It was to receive any payments for losses on any of the policies from the first to the last inclusive.

The next objection to the admissibility of evidence was made by the defendants, and related to that offered by the plaintiffs to show what Stearns wrote to them in respect to his representations, and what the bank was advised on this point by their counsel. If the chief question in this case was one of intent, such testimony might be competent, as a part of the *res gestæ* to prove efforts on the part of the plaintiffs to conform to Stearns's supposed representations. But it was unnecessary to show their omission to do more on the subject to obtain a copy of them, under professional advice, because they were not liable on account of their intentions.

This evidence may also operate in favor of the defendants, being a circumstance to show the recognition by the bank at that time of their duty to conform to Stearns's representations, in that particular policy, where a clause requiring it was expressly introduced, as it had been, at the time one letter was written to the agent of the defendants and one to Stearns on this matter. But it is not evidence to exonerate the bank from its duty to comply with the representations on file on account of what Stearns or their counsel afterwards said, it being the misfortune of the bank, if either of them erred in the state-

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ments they made or in their advice; and the only remedy, if any, by the bank for such an error, being against those persons.

Having disposed of these preliminary points, the next inquiry is, What were the representations which the present plaintiffs must in fact and law be considered as having made in respect to their property, as connected with the risk by fire? In order to decide intelligibly, it will be necessary to advert to the fact, that the first nominal insurer of this property at the office of the defendants was Jonathan Stearns.

However the case may be as to insurances, where no representations are made to the insurers as to the risks belonging to the premises, which are great and would sensibly increase the danger; and however in marine policies any omission to make full disclosures on such matters may vitiate the insurance on account of the suppression of a part of the whole truth, rather than a suggestion of what is false, it is to be remembered, that Stearns in this case actually made long and written representations on inquiries put by the defendants. They were his written answers to the printed interrogatories, usually put in the case of distant manufactories applying to be insured.

The insurance was effected to him on the faith of the truth of those representations, and on the express stipulation, that the policy should be void if they were materially untrue, or the condition of the property should become changed so as materially to increase the risk, and notice not to be given to the defendants of such change.

The representations referred to in this policy were not then a mere form in the instrument, when none whatever had been really made; but they referred to an actual occurrence between these parties, and an important occurrence, considering the distance of the factory from the office, and the probable want of personal knowledge about its condition by the directors.

Under this view of the facts of the present case, the next inquiry, and one of some complexity and difficulty, is, whether the same representations must be considered as made or adopted by the plaintiffs in the insurance for 1846, now in suit. In order to form a correct conclusion as to that, being a matter of fact principally, it will be necessary to advert to the important

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circumstance before mentioned, that the Ogdensburg Bank, for whose benefit the present suit is instituted, was the chief party in interest in the first insurance by Stearns, and has been in all the intervening insurances made from 1834 to 1846. That not only the first one was assigned to the bank at its date, but the defendants, informed of the bank's interest, and assenting to the assignment and in every renewal since, any loss happening was to be paid to the bank, and the cashier of it was the agent to effect the renewal and advance the premium; and that the bank now appears to have a claim on the property to a larger amount than the sum insured.

All the different persons then in 1834, and since, to whom the insurances nominally run, including the present plaintiffs, were virtually in this transaction but agents for the bank to the extent of its interests. They acted at its request, and in its behalf, and for its security; and generally, the bank itself, rather than they, transacted the business, and saw to its correctness and had possession of the policies as well as advanced the premiums. The other persons had rights and interests also, but subordinate. They either had a residuary interest, or a right by contract to the property and insurance after the bank was satisfied.

In 1838 the title had become vested entirely in the bank; and the policy was then made in its own name, as well as on its account and for its interest. No new representations had been made since Stearns's original ones on file in 1834; and this the bank doubtless knew, as it not only, received the assignment of their policy for that year, referring to those representations, but had itself taken out the subsequent renewals without filing any new representations. In order to remove any doubt, that in the general allusion to representations in the policy as made by the insured, and on which the policy of 1838 was founded, it was meant to adopt those on which the policy of 1834 and in the intervening years had issued, it was stated separately in A. D. 1838, that though the factory was not then in operation, "the assured have liberty to put the same in operation, agreeably to the representations heretofore made by Jonathan Stearns."

If the bank did not know with certainty the extent of those

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representations, it was the fault and risk of itself to undertake to act on them without such knowledge. In 1839 that special clause was omitted. This was probably done either because deemed unnecessary to repeat it in addition to the general clause referring to representations, or because the factory was not in operation. And in 1840, the bank itself, fearing lest it might not be permissible to resume operations without a special permission, desired it, and this same clause was restored, among other things, expressly specifying Stearns's representations as those which were in that event to govern. The bank then, by letter, asked of the agent a copy of those representations, but as he had not the original, applied to Stearns, who also had no duplicate, original or copy. But Stearns stated that he had always complied with the representations, saying nothing in particular about the picking-room. Without inquiring further as to their exact contents, unfortunately the bank, under advice of counsel, acquiesced in the policy as it stood, and put the factory in operation under it, through Stearns himself, by a lease to him for that purpose, having stated in their letter that they supposed "the application referred to in the policy was that made by Stearns."

Not the least doubt, then, can exist that the property was used in 1840, under Stearns's representations as originally made and used by himself under the bank. They either knowingly and deliberately expected to conform to them, and, in case of material variation and a loss, to have the policy void; or relied on advice of counsel that they were not binding. It is likewise clear, that if Stearns misled the bank, either through forgetfulness or design, as to the extent or character of his written representations to the defendants, which seems probable, the consequences must fall on them, the employers of Stearns, and the confiders in him, rather than on the defendants. See *Smith v. Babcock et al.* 2 Woodb. & Min. 246; *Mason et al. v. Crosby et al.* 1 Ib. 343.

The change in the phraseology in the policy of 1841 creates some difficulty as to that year, and may have misled their counsel, if his advice was predicated on that, and applied to that year, and not the previous one. It does not omit the special clause entirely, as in 1839, and thus appear to rely on the notice

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given by it in 1838, and the general reference to representations, which could mean only those made by Stearns originally, and since adopted by the bank, as none others had been made, and Stearns was their agent in interest. But it specially permits the factory to be used, "the assured being answerable for the warranty above," there being immediately above a warranty to remove the waste once in forty-eight hours; and "that the lamps in the carding-room shall be inclosed in glass."

It may hastily have been inferred from this that they were the only precautions to be observed, and that the insured had no farther concern or liability on account of any of Stearns's representations. But it is to be noticed that this same warranty was in the original policy in 1834, and a reference also to the representations made by Stearns, and their binding force in all respects was there, as well as here, recognized, so that one had not been introduced for the other.

This was the case also in the intervening years, while the factory was in operation, both provisions being often inserted together; and, when the special clause was inserted referring to Stearns's representations, *eo nomine*, it seemed to be only because the factory was not then in actual operation, but might become so in the course of the year, and was then to be used in the manner he had represented.

The parties, too, being presumed to know the law, must be considered as aware of the distinction between warranties and mere representations. Both usually exist, though as to different matters. Generally, likewise, the former are in the body of the instrument, and are there named as warranties in words or substance, or referred to as such (5 Hill, 101; 2 Hall, R. 589; Cowp. 785; Dbug. 11, note); while the latter are referred to only as representations or statements of facts, and are seldom introduced in detail in the policy itself. 3 Hill, 501; 5 Ib. 101, 188.

The former, likewise, bind the party to them as a condition precedent, whether material or not; while the latter binds only to a substantial or virtual compliance, and may vary from the exact part, if the variance be not so material as to increase clearly the risk.

In 1841, then, the warranty was one thing, and provided for

by itself; the representations were another, and provided for by themselves, and in the same manner they had been in 1834. Stearns was the real operator at both periods. The bank was the virtual owner at both. The representations at both were only those originally made by Stearns, and this the bank probably knew, and that they were relied on by the defendants, as being adopted by the bank. The bank, too, had paid the premium, and took out the policy in 1841, as only a "continuance" of the previous policies.

It seems to me, then, to be inconsistent with the general character of the whole transaction, and it would be bad faith to suppose that the representations, referred to in the general clause, were not meant by both parties to be those at first made by Stearns, and since continued, or renewed, or in other words, adopted by the bank as its own. If any *aggregatio mentium*, any unity of views existed, it must be presumed to have been that. In 1843, the bank desired a renewal of the policy, still running to pay the loss to them, though wishing the policy to bear the names of the plaintiffs, as they had made a contract to purchase and use the factory. The policy was accordingly then renewed; and, perhaps, because a new party was introduced, a special provision was inserted, so that the plaintiffs could not, any more than the bank, plead ignorance of the representations upon which the insurance rested. It was in these words: "This policy is issued on the representations formerly made by Jona. Stearns, the former owner, which representation is binding on the assured."

No objection was made to this, though the policy was sent back for correction in another particular.

In 1844 and 1845 "continuances" of the policy were granted, in like form, without repealing the special clause, as the nominal or real parties in interest remained the same; and the reason applicable to those representations being in force, and being, in my opinion, in point of fact, adopted by the insured, for the causes which have just been named and explained in respect to the year 1841.

I have been thus particular in tracing through to the close, and assigning various reasons why Stearns's representations must be considered as adopted by the plaintiffs themselves, in

the policy itself, and binding on them as a part of the written contract; and not as parol evidence of matter introduced to vary or contradict the written contract.

But were this otherwise, it is by no means certain, whether, on the general principles of insurance, the plaintiffs would not be responsible for the use of any lamps in the picking-room, considering either that none were used originally, or that Stearns's statement to that effect was untrue.

If an absolute representation is made by the insured in respect to the risk, which is material, and others then interested renew the insurance without varying the statement, and a privity of interest or contract is kept up until a loss occurs, surely the loss ought not to fall on the insurer, when it happens by a departure from that statement, and on a particular which, it is agreed, increased the risk. *Columbian Ins. Co. v. Lawrence*, 10 Pet. 508; *Alsop v. Com. Ins. Co.* 1 Sumn. 458; 2 Denio, 75.

Surely the assured ought not to recover when they were expressly notified that the insurance was founded and renewed on the representations thus made, though the assured may not have examined what they were, but had an opportunity to do it, and unwisely confided in the recollection of the person making them without examining the original on file.

If the lamps were used in the picking-room at first when Stearns stated otherwise, such a material misrepresentation would vitiate insurances generally. 2 Pet. 47; 10 Ib. 516.

If they were not so used at first, but the lamps were soon after introduced into the picking-room, any material change like this in the risk of property, without communicating it (before a new insurance, or a further continuance of the old one to the same parties in interest), renders the new policy void. It clashes with the stipulations of the policy itself, and in all stages of the case there must be neither *suppressio veri* nor *suggestio falsi*. Duer on Ins. 380. There need be no fraudulent intent; but if either of these acts exists without such an intent, it saps the foundation on which the insurance rests, and the latter fails. Duer on Ins. 506; 1 Phil. on Ins. 210; 2 Pet. 25; 22 Pick. 200; 1 Pet. 185; 3 Mass. 103; 3 Dall. 491; 6 Mass. 220; 18 Pick. 419; 10 Ib. 535; 5 Hill, 101, 188; 8 Peters, 557; 20 Maine R. 125; 8 Metc. 114.

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Another fact, strongly indicating that the bank, the party in interest throughout, must have known and expected that all the continuances or renewals of the policy were founded on the original representations, was, that these renewals were all made through the agent at Pittsfield, and not at the office at Boston; and that in this case, as in most cases of insurance, the office alone takes new insurances or new risks, and acts on new or different representations, and not the agent.

Regarding the evidence here offered as to the representations to be in law competent; and to show in fact the adoption of those made by Stearns, and considering also that this evidence would, independent of the words of the policy in another view, show either a material misrepresentation by the original assured, or a material change in the risk since, not communicated by him or the privies in interest and contract since, the policy must in law be considered void.

This is a misfortune to the present plaintiffs as well as the bank; because the latter was probably misled by Stearns's letter as to the extent of his original representations, and may have believed that they extended only to the keeping of no uninclosed lamps in the building, but allowed such in the picking-room as well as in other parts of the building.

Had they not believed this, they would probably have discontinued the use of them in the picking-room, or had the original representation altered, or a new one communicated, and paid the increased premium, which such use of lamps would justify and require. The difference is conceded to be material, and well may be, as in this very instance the loss was caused by the use of lamps there, though inclosed in glass. Such is the extraordinary fineness of the cotton fibres and dust, which fills the air in that room, in factories in great quantities, that any lamp which has air holes, or an open top and loose cover (such as are necessary to continue or preserve the light), is liable to be filled with them and to ignite them, and, unless the building is detached, or secured by iron doors, to cause the almost inevitable loss of the whole establishment.

Again, the insured, had they examined the policy carefully, would have seen from the warranty that the use of any lamps in the picking-room was probably not contemplated.

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The warranty extends only to "the lamps in the carding-room;" that they shall be "inclosed in glass;" and, had it been represented, or at any time understood by the insurers, that lamps were to be used in the picking-room also, the insured must presume that they would doubtless have required the warranty to cover them, as well as those in the carding-room, it being more necessary for safety to have them so inclosed if in the picking-room.

But the original representation was, "no lamps used in the picking-room;" and hence no warranty was required to keep them there inclosed in glass, and no increase of premium asked on account of their being kept there at all, so dangerous as it was in a room not separate from the main building, and not made safe by iron doors. It is to be recollected, that such a room in a cotton factory, thus situated, is almost as perilous as a powder-magazine, to use lamps in. It is full of the material for gunpowder cotton; and all representations concerning it, or changes of risk in relation to it, must be known by all the parties to be vital.

It is conceded, that the assured is entitled to a favorable construction in particulars which are doubtful. Duer on Ins. 132.

But this is where the insured is not misled by any erroneous representation, or any material change in the risk not communicated to him. For where either of those occur, whether through the fault or neglect of the assured or his agent, the policy cannot be enforced. *Carpenter v. Prov. Ins. Co.* 4 How. 185.

The insurer is entitled, both in law and in equity, to all the material information, connected with the risk, which the insured possesses, in order that he may have the fullest means of deciding on the extent of the risk and premium. 1 Wash. C. C. 161; 6 Cra. 279, 338.

The law is rigorous and unaccommodating, even to forgetfulness, mistake, or neglect of the agents on the part of the insured, in respect to matters like these. *Jennings v. Chenango Mut. Ins. Co.* 2 Denio, 75.

Something has been said in the argument that the word "lamps," as used here in the representation, meant only permanent ones, and not movable lamps or lanterns; and that the latter might be used anywhere. But as the warranty was to

keep them inclosed in glass when used in the carding-room, and by the original representation none were used in the picking-room, the word "lamp" would seem to include any light or blaze in the lamp form, as any such was to be inclosed in glass. The spirit of the provision, as well as the general meaning of the expression, would extend to anything of the kind that could cause combustion in giving light, whether movable or permanent. Indeed, movable lights or lanterns are in such rooms more dangerous, though inclosed in glass, than permanent ones, as the latter can be fixed more remote from the machinery, while the former are usually employed to aid in closer observations and repairs, and constantly subject to being carried nearer what is most combustible.

On the hypothesis of the plaintiffs, as to this point, this inconsistency would follow, that movable lights, the most dangerous, could be used in the picking-room, but not permanent ones, the least dangerous; or that the parties would deem it so important to have lamps covered with glass in the carding-room, as to enter into a warranty to do it, and yet intend or assent that lanterns or lamps should be used in the picking-room, without any warranty to keep them inclosed in glass.

It becomes unnecessary, therefore, to go into the evidence, whether it is customary to use lamps in picking-rooms; or if at all, in those situated within the factory, and without iron doors. Because, whatever may be the usage, it is conceded, that they enhance the risk; and the representation here was originally that none were used in the picking-room.

If that statement was true, then they were since introduced without notice, and thus materially increased the risk, and avoided the policy. If that statement was false, then the policy was void, on the ground of a false and important representation. 2 Peters, 49; 10 Ib. 512; 1 Ib. 185; 16 Ib. 496; 10 Pick. 535; 1 Wash. C. C. 161.

In either of these aspects of the case, therefore, that evidence becomes of no importance; and a verdict must, according to agreement, be entered for the defendants.

The plaintiffs upon a subsequent day moved for verdict and judgment for return of premiums, on the ground that the policy did not attach.

The following was the decision of the court upon the motion.

WOODBURY, J. My first impressions were not in favor of this motion, either on its merits, or on the adopted form. On the merits it seemed doubtful whether the policy must not be considered to have attached from the time named in it, till some actual instance of the use of lamps in the picking-room occurred. If it once attaches, the premium is not to be restored, however short the time. Cowp. 668.

Certainly not the whole of the premium, and none unless it can be properly divided, and a part of the risk, as in some sea usages, can be considered as never having occurred. 3 Burr. 1240; 1 W. Black. 315.

But on consideration that, in this class of cases, the construction more favorable to the insured is the approved one, and seems on the whole most equitable, I think the representations can fairly be regarded as of such a character that the risk never did commence. The representations were on this point, "no lamps used in the picking-room."

Now, in fact, lamps were there suspended in that room constantly, and had been for some years, and others carried into it occasionally at the time of the last insurance, and of all the others made to these plaintiffs. This must be regarded as "lamps used" there, in common parlance, during this period, though not really lighted up the whole time, nor on the precise day when this policy commenced.

If the lamps had been first introduced after the year began, it would be otherwise. *Pim v. Reid*, 6 Scott, N. R. 982.¹

What strengthens this view, that they must be considered as used before, is another consideration, that the plaintiffs used them there under a false impression caused by Stearns, the former owner and the original maker of the representation, stating that he had a right to use them there under the policy if kept inclosed in glass. Hence they were placed there to be used long before, were used when needed, and must be regarded as a violation, though undesignedly, of the terms of the policy during the whole period, after introduced.

It is well settled, that where the risk never attached, the

¹ *Ante*, p. 245.

premium must be returned, if there was no fraud. *Feise v. Parkinson*, 4 Taunt. 641; *Colby v. Hunter*, M. & M. 81; 3 Carr. & Payne, 7; 2 Phil. Ins. 526. It must be returned though there was "neglect and even fault," by the assured. *Stevenson v. Snow*, 3 Burr. 1240; *Tyrie v. Fletcher*, Cowp. 668.

Here neglect existed in relying on Stearns's memory, but probably no designed departure fraudulently from what the policy was supposed to be.

If the lamps were fraudulently used there, in disregard of the representations, the premiums should be retained by the company. 4 Taunt. 641; 1 Park., Ins. 329; 2 Marsh. Ins. 661. It will be seen, however, that the circumstances just referred to, showing how these parties were misled into their use, repel any presumption of such fraud.

All that remains, then, are some questions of form. How many of the premiums can be recovered back in this action, in the name of these plaintiffs? Manifestly none, except those paid on policies executed to these plaintiffs.

Any others, paid on policies to others, must be recovered, if at all, in suits in their names; and the statute of limitations would bar all except those paid by these plaintiffs, and perhaps one other, if an action is ever instituted for that.

Again, in respect to form, this suit, looking to the count for money had and received, can, in my view, properly cover all premiums between these parties paid within six years, and is not confined to the premium paid on the last policy, named in the special count.

The other premiums are in cases where the risk did not attach as well as this. The parties are the same. The form of the count applies to all; and all of them rest on the same basis of not being *ex æquo et bono*, retainable by the office, when the risk never attached.

The first premium paid by these plaintiffs on an insurance to them was in August, 1842, and the last one in August, 1845; making four in all to be returned.

The remaining point to be considered, in respect to form, is the time and manner of moving "for the return" of the premiums.

At the trial of the cause, no claim of that kind was under-

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stood to be urged. In the testimony submitted to me, and in the argument, my attention was not called to any claim of this kind. It was not until an opinion on the merits of the action for a loss under the policy had been given by agreement, on both the facts and the law, and a verdict directed for the defendants, that this claim on a subsequent day was presented.

If allowed now, unless by consent, it must be virtually by granting a true [new?] trial. That was the course pursued under like circumstances in *Feise v. Parkinson*, 4 Taunt. 641.

What should be the terms which are just for allowing this new trial, under all the circumstances, or, which is the same thing in substance, for changing at this time the verdict, so as to be for the plaintiff instead of the defendants, and throwing the burden of costs in the cause on the latter rather than where it now is, on the former?

It seems to me that the just terms should be the payment to defendants of the costs of the trial, in which they succeeded, which was upon the great point in controversy, and the fruits of which, so far as regards costs, are now asked to be taken from them by allowing this motion.

As another illustration, showing that these terms are the proper ones, if this claim for a return premium had been set up at the former trial, the defendants might have paid the amount into court, with costs to that time; and then, if the plaintiffs failed to recover anything for losses, they would have to pay the defendants the costs of that trial. See also 4 Bing. 676.

Let then the former verdict, ordered for the defendants, be considered as set aside, and a new trial granted, on the payment to the defendants of the costs of the former trial.

Then on the new trial let a new verdict be entered for the plaintiffs for the four last premiums and costs of suit, except those incurred at the former trial, and which we now allow to the defendants, as the prevailing parties in that trial.

This case was now taken to the supreme court of the United States, where, in January term, 1850, the following decision was rendered:¹ —

WOODBURY, J. The original action in this case was assumpsit by the plain-

tiffs in error on a policy of insurance, made August 13, 1845.

From the detailed statement of the facts, it will be seen that the loss occurred on the 13th of March, 1846, and was to be paid to the Ogdensburg Bank, which

¹ 8 How. 235.

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held the title to the property insured, but was under a contract in a certain event to convey it to the plaintiffs, they having already paid for it in part.

The original insurance was made in 1834, by Jonathan Stearns, who had mortgaged to the bank the factory insured, and who continued most of the time till the loss to conduct its operations under insurances renewed yearly, often in different names, stipulating that any loss should be paid to the bank.

In April, 1834, when application was first made for insurance, the defendants, doing business in Boston, Massachusetts, put numerous written interrogatories to Stearns, who lived in Malone, New York, where the factory was situated, and to one of them he replied that no lamps were "used in the picking-room." These interrogatories, and the answers to them, were not annexed to the policy, but were put on file in the office; and the policy purported to have been "made and accepted upon the representation of the said assured, contained in his application therefor, to which reference is to be had," &c., &c.

No new representations appear to have been made at the different renewals, but only a general reference to representations like that just named; and in three or four instances, when the policy was in a new name, a specific statement was inserted that the insurance was entered into "agreeably to the representations heretofore made by Jonathan Stearns."

Referring to the record and preliminary statement of this case for other details, the plaintiffs objected first to the competency of parol evidence, which was offered to prove that the representations signed by Stearns, and on file with his application, were those made by him, and to the instruction of the court that, if they were adopted by the plaintiffs, the present policy, as well as the original one, must be considered as founded on them and void, if they were not true.

It will be proper, then, to consider first whether this parol evidence was competent for the purpose for which it was offered.

Without meaning to impugn the great

elementary principle that written instruments are not to be varied or contradicted by parol, it suffices to say here, that this testimony was not admitted to vary or contradict any portion of what had been written. See *Phillips v. Preston*, 5 How. 291.

It merely went to identify what the writing in the policy referred to, as a part or parcel of the contract, like a reference in one deed or contract to another deed or contract. 13 Wendell, 92; *Jennings v. Chenango Ins. Co.* 2 Denio, 82; *Phillips on Ins.* 47; 16 Pick. 503; 1 D. & E. 343; 2 Brod. & Bingh. 533; 4 Russ. 540; 20 Pick. 121; 1 Paige, 291; 8 Metcalf, 114, 350; 4 How. 353; 3 Barn. & Ald. 299; *Wigram on Ext. Ev.* 54, 55; 1 Hen. Bl. 254; 2 Hen. Bl. 577; 6 D. & E. 710; 1 Duer on Ins. 74.

It added to what was written nothing, it subtracted nothing, it changed nothing, and we think its admission was legal.

In the next place, the instruction that the plaintiffs were bound by those representations, if adopting them subsequently at the time of making their insurance, accorded with both the law and equity of the transaction. If they adopted them and induced the defendants to act on them, it would operate fraudulently to let them be disavowed after a loss. So if the plaintiffs ratified them, in their subsequent application, if no other representations were made or relied on except these, if their attention was called to these, if the bank was a party in interest through all these insurances, without repudiating these representations, and if these were the only set of representations used in all of them, it surely must comport with justice, as well as law, to have them govern.

The cases of like subsequent adoptions and ratifications of what had been done before by others are very numerous. Among them, see those collected in *Story on Agency*, §§ 252, 253. Even "slight circumstances and small matters will sometimes suffice to raise the presumption of a ratification." *Ward v. Evans*, 2 Lord Raym. 928; 3 Wash. C. C. 151; 13 Wend. 114; 3 Chitty, Com. L. 197.

This view of the case, standing alone

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would entitle the defendants to be discharged; for the picking-room, contrary to these representations, had a lamp, and indeed lamps in it, and their use was proved to be the cause of the fire which destroyed the factory.

We should, therefore, affirm the judgment below without further inquiry, did not the bill of exceptions disclose another ruling, which, as the record now stands, requires consideration. When the judgment below is, as here, well sustained by the opinion entertained on a decisive point, it is usually of no consequence whether another point was correctly ruled or not. But as the bill of exceptions in this case was drawn up by the plaintiffs, it states that the jury were instructed to find a verdict for the defendants on the last ground, if, on the facts, the first one failed; and hence, looking to the record, the last ground may have been passed on by the jury, and have influenced their verdict. To be sure the report of this case below, in 2 Wood. & Min. 472, shows that a verdict was taken by agreement of parties, or only *pro forma*, in order to bring the questions of law to the supreme court, and, therefore, that no jury could in truth, in this case, have been thus influenced or misled. Yet, this fact not appearing on the record brought here, the case, till revised and corrected below in this particular, must be considered as if the jury had actually examined both grounds, and had really decided them. But even on that hypothesis, if the second point was properly ruled, no occasion would exist for sending the case back for correction in the statement as to the verdict, in connection with the first point.

Whether it was properly ruled or not involves a question of much novelty, being, in one aspect of it, a case, perhaps, of the first impression, and without any precedent to govern us, and is of so much importance in insurance as to deserve great caution in settling it. From the report of the case below, before referred to, the circuit court, though alluding to the last point, do not appear to have gone into any critical discussion and opinion on it.

But, the bill of exceptions being so drawn up as to exhibit a positive instruction given on it by that court to the jury, it is necessary for us to examine with care whether an instruction like that presented here could be legally given.

First, then, what is the substance of that supposed instruction?

It is, that if no representations were made or adopted by the plaintiffs, they would not be entitled to recover if lamps were in truth used in the picking-room, which were conceded to be material to the risk, and this use was known to the plaintiffs and not to the defendants, and this use was meant to be continued, and was continued, and caused the present loss. In the next place, what must be considered the law in relation to this subject? Little doubt exists that, when representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking-room, where one or more was in truth used, makes the policy void, not only for misrepresentation, but misdescription and concealment. 1 Marshall on Ins. 481; Ellis on Fire & Life Ins. 58; *Dobson v. Sathely*, 1 Moody & Malk. 90; 6 Cowen, 673; 4 Mass. 337.

A false representation avoids the policy, because it either misleads or defrauds. *Livingston et al. v. Mar. Ins. Co.* 7 Cranch, 506.

In such a state of things, also, the insured — knowing that he is asked for representations to enable the underwriter to decide properly whether he will insure at all, and, if so, at what premium — must suppress nothing material to the risk, or the underwriter will not stand on equal grounds with himself, and will be forced to act in the dark more than himself, and probably to misjudge. 1 Marshall on Ins. 473, 474, note; *Lynch v. Dunsford*, 14 East, 494; *Maryland Ins. Co. v. Ruden's Ad.* 6 Cranch, 338, and *Livingston v. Mar. Ins. Co.* Ib. 279; *Columbian Ins. Co. v. Lawrence*, 10 Pet. 516; *McLanahan v. Universal Ins. Co.* 1 Pet. 185; 2 Pet. 59; 2 Duer, 379, 388, 411; 2 Caines, 57; 1 Wash. C. C. 162.

Concealment thus would operate in some cases as a fraud, and in all will make

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the risk very different from what the insurer knew and agreed to. 3 Burr. 1905; Ellis on Fire and Life Ins. 38.

But the hypothetical position presented by this record is that the law would be the same, provided no representations whatever were made, and in this form it does not, in the state of facts exhibited in the record meet with the sanction of this court. The chief controversy appears to have been concerning the first point; and when this last question was made a part of the case by agreement of counsel, it was not known whether this court would consider the original representations by Stearns as adopted, and thus binding on those subsequently insured. Independent of those, none appear to have been made or asked.

Representations, however, in insurances, it is well known, almost invariably exist, either written or parol. *Columbian Ins. Co. v. Lawrence*, 2 Pet. 49; *S. C.* 10 Pet. 515. But they are not usually named or incorporated in the policy, except on the continent of Europe. 3 Kent, 237; 9 Barn. & Cress. 693.

It is fair to presume that they took place in all the reported cases on insurance, though often not named, unless the contrary is expressly stated, as they are in general, "the principal inducements to contract, and furnish the best grounds upon which the premium can be calculated." 1 Marsh. on Ins. 449.

But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. That is the chief novelty in this question, as hypothetically stated in the bill of exceptions. We think that the governing test on it must be this: It must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him.

This rule must not be misapprehended and supposed to rest on a principle different and somewhat ordinary, that insurers

are always to be expected to possess some general knowledge of such matters as they deal with, independent of inquiries to the assured. 8 Pet. 582.

Nor on the position well settled, that the insurer must be presumed to know what is material in the course of any particular trade — its usages at home and abroad, and those transactions which are public, and equally open to the knowledge of both parties. *Hazard's Ad. v. New England Mar. Ins. Co.* 8 Pet. 557; 2 Duer on Ins. 379, 478; 3 Kent's Com. 285, 286; *Green v. Merchants' Ins. Co.* 10 Pick. 403; 4 Mason C. C. 439; *Buck et al. v. Chesapeake Ins. Co.* 1 Pet. 160. Nor on any special usage proved, as in *Long v. Duff*, 2 Bos. & Pul. 210, that it was, in a case like this, the duty of "the underwriter to obtain this information for himself."

But when representations are not asked or given, and with only this general knowledge the insurer chooses to assume the risk, he must, in point of law, be deemed to do it at his peril. It has been justly remarked, in a case somewhat like this in principle: "With this knowledge, and without asking a question, the defendant underwrote; and by so doing, he took the knowledge of the state of the place upon himself," &c. 1 Marshall on Ins. 480; *Carter v. Boehm*, 3 Burr. 1905.

In cases of fire insurance, also, the underwriters may be considered as more likely to do this than in marine insurances; because the subject insured is usually situated on land and nearer, so as to be examined easier by them or their agents; and the circumstances connected with it are more uniform and better known to all. 1 Harr. & Gill, 295; *Burritt v. Saratoga M. F. Ins. Co.* 5 Hill, 192.

It is true, that, from what is reasonable and just, some exceptions must exist to this general rule, though none of them are believed to cover the present case. Thus the insurer must be supposed, if no special information has been asked or obtained, to take the risk, on the hypothesis that nothing unusual exists enhancing the risk; and hence, as in this case, if lamps are used in the picking-room which do enhance it, he must show that their use

Cross-examination. — Evidence.

in the manner practised was unusual or not customary, and then, though no representations had been asked or made, he would make out a case, where it was the duty of the insured to inform him of the fact, and where *suppressio veri* would be as improper and injurious as *suggestio falsi*. *Livingston v. Mar. Ins. Co.* 6 Cranch, 281.

So if any extrinsic peril existed outside and near a building insured, and which increased the risk, the insured should communicate that though not requested. *Bufe v. Turner*, 6 Taunt. 338; *Walden v. Louis. Ins. Co.* 12 Louis. 134. But as to the ordinary risks connected with the property insured, if no representations whatever are asked or given, the insurer must, as before remarked, be supposed to assume them; and, if he acts without inquiry anywhere concerning them, seems quite as negligent as the insured, who is silent when not requested to speak. The conclusions on the whole case then are, that the defendants are entitled to be discharged on the first ground upon the merits; because the plaintiffs were interrogated in writing on this very fact and risk, or others were, whose answers they adopted; and the truth was not disclosed in their representations in reply, when it is conceded to have been material to the risk; and therefore by the express stipulations of this policy, as well as by the general principles of the law of insurance, the plaintiffs should not recover. But our judgment cannot be rendered on this con-

clusion standing alone, because the second point is connected with it in the form before explained. Again, the defendants would be entitled to be discharged under the second point on the ground, which accords with the truth here, that representations were really made on this subject; but not, if none whatever were made, according to what is hypothetically suggested in the record. The judgment below must, therefore, be reversed, for the purpose of correcting what is defective in the manner of stating how the verdict was taken and how the last question stood by itself on the facts proved; and the case must be remanded to the court below, with instructions to take all proper steps to carry into effect the views presented in this opinion.

ORDER. — This cause came on to be heard on the transcript of the records from the circuit court of the United States for the district of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, with costs, for the purpose of correcting what is defective in the manner of stating how the verdict was taken, and how the last question stood by itself on the facts proved, and that this cause be, and the same is hereby, remanded to the said circuit court for further proceedings to be had therein in conformity to the opinion of this court.

HOWARD vs. THE CITY FIRE INSURANCE COMPANY.¹

(Supreme Court, New York, May Term, 1847.)

Cross-examination. — Evidence.

A witness may be impeached on his own cross-examination; but his answers in such case are conclusive.

The question arose in this case concerning the amount of merchandise contained in the building before it was burned; and it was held proper for the defendant to ask a witness

¹ 4 Denio, 502.

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who had often been in it, and who was employed in the adjoining building, whether the store in question contained a greater or less amount of goods than did his own, which was of about the same size, was filled with similar goods, and of which an inventory had been taken.

The defendant gave in evidence an affidavit of the plaintiff to show that the latter had been guilty of false swearing. *Held*, that the affidavit did not thereby become evidence against the defendant of other matters.

The case is sufficiently stated in the head note.

C. O'Conor, for the plaintiff in error.

J. P. Hall, for the defendants in error.

By the Court, *JEWETT, J.* It is a familiar rule that the credit of a witness may be impeached, either by a cross-examination, by general evidence affecting his character, or by proof that he has before done or said that which is inconsistent with his testimony on the trial. The fact inquired of by the question objected to, in the case of the witness Howard, was not in the least connected with the subject of the inquiry in the suit. It was purely collateral. Whatever, therefore, the answer of the witness might have been, it would have been conclusive. No evidence would have been admissible to contradict it. But, for the purpose of affecting the credit of the witness, I think the question was proper, and that the objection was rightly overruled. *Stark. Ev. part 2, 134, § 22, p. 145, § 28.*

The value of the plaintiff's stock of goods at the time of the fire was a question directly in issue; and to ascertain that, the amount of his stock at different and given periods, and the purchases and sales made by him during those periods, had been inquired about and evidence had been given upon that subject. The witness Howard had testified that the value of the plaintiff's goods at the time of the fire was upwards of forty-five thousand dollars, and had given evidence as to the amount and value at previous periods. Other witnesses having greater or less means of knowledge on the subject, testified upon the question. In this state of the case, the defendants, in order to show facts from which the jury would be justified in the conclusion that the quantity and value had been greatly over-estimated by the plaintiff's witnesses, called the witness West. His evidence was not direct and positive, as to the fact in question; yet the facts and circumstances stated by him were such, that if the jury gave credit to their truth, a reasonable presumption or in-

ference might well be founded upon them, that the quantity and value of the merchandise destroyed by the fire was much less than the evidence before given tended to establish; and in my judgment, the evidence was competent and relevant for the consideration of the jury. It was not of the character of the evidence offered and rejected in *The Phoenix Fire Ins. Co. v. Philip*, 13 Wend. 81. There the action was upon a policy of insurance on the stock of merchandise and materials of the plaintiff, a hair-worker. The amount insured was \$12,000. The property was destroyed by fire, and the plaintiff claimed \$11,099.56, and gave evidence tending to show that to be the amount of his loss. The defendant, to show that the value of the merchandise was over-estimated, proposed to prove the amount of stock of the largest dealer in hair in the city. It was there held, and rightly too, as I think, that the evidence offered was too loose and unsatisfactory. It was the mere opinion of the witness, that other dealers in the same articles had much less stock than the plaintiff claimed to have had. But I do not see that the principle decided in that case has any application to the question raised in this.

The plaintiff on the trial proved that he had furnished to the defendants preliminary proofs required by the conditions of the policy of insurance, and an affidavit made by the plaintiff, with schedules annexed containing a particular account of his loss and damage in consequence of the fire. The defendants read to the jury such preliminary proofs, for the purpose of showing from the evidence in the case, that the plaintiff had forfeited all claim on the defendants by reason of some fraud or false swearing contained in the plaintiff's preliminary proofs, pursuant to the last clause of said ninth section of the conditions. The charge upon the effect of that evidence, which was excepted to, presents the only remaining question made by the bill of exceptions. The principle decided in the case of *The Marlison Co. Bank v. Gould*, 5 Hill, 309, I think is applicable, and must control this case. The preliminary proofs were furnished, to comply with a condition of the policy upon which his claim to the insurance depended. Unless that condition was shown, *prima facie*, to have been performed, the plaintiff would have failed to make out a presumptive right to recover.

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Having given that proof, the defendants had the right to show, if they could, that the plaintiff had been guilty of "fraud or false swearing" in those papers, and if shown, it would, according to the condition, bar the plaintiff of all remedy against the defendants on the policy. To do that, it became necessary to read to the jury the affidavit of the plaintiff, in order to apply the contradictory evidence given. With that view of the question, the court below held that it was proper for the defendants to read the affidavit, and that it was not to be regarded by the jury as evidence in favor of the plaintiff of the facts asserted therein. In this I think the court correctly decided. After the defendants gave evidence tending to impeach the facts contained in the affidavit, the plaintiff had no right to the benefit of the affidavit, as rebutting evidence of the facts thereby asserted, on the question of the falsity of the matters represented by it, or of the fraud imputed. The judgment must be affirmed.

Judgment affirmed.

HAMILTON vs. LYCOMING MUTUAL INSURANCE COMPANY.¹

(Supreme Court, Pennsylvania, May Term, 1847.)

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The plaintiff applied to the defendants' agent for a policy of insurance on an academy then occupied by him. He paid the requisite proportion of the premium, executed a note for the residue, and had a survey made according to the regulations, at his own expense, all of which was laid before the company, and referred to its executive committee. The secretary of the company subsequently wrote to the agent, requiring the plaintiff to substitute an earthen-ware stove-pipe collar for his sheet-iron one, and to procure the assent of the trustees of the academy, who held the title, to the contract of insurance; saying that, being duly certified that these things were done, he would send on the policy. The plaintiff made the substitution and procured the written assent of the trustees, told the agent what had been done, and repeatedly urged him to call at the plaintiff's house and attend to the matter. The agent said that he must first bring him the paper containing the written assent of the trustees. The agent being requested to call and get this, promised to do so, but never called for it. *Held*, that the policy had taken effect from the time of the notification of the performance of the requirements of the secretary.

On the 22d January, 1842, the plaintiff in error caused a survey to be made by the agent of defendants, of a building

¹ 5 Barr, 339.

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known as the Clinton Academy, and made a written application to the agent for an insurance. In this it was stated, there was a flue in the house secured by a sheet-iron collar. On the same day he executed and delivered to the agent a premium note, promising to pay in such sums as the directors might, according to their charter, demand. On this note the amount required to be paid in cash, together with the price of the policy, was paid, and the plaintiff received from the agent a certificate reciting the application, the note, and the payments thereon, and stating that \$1,050 "will be insured on the property for five years from the date of the application, if the company approve the said application." The papers were transmitted to the company and laid before the executive committee, who did not approve of the application, nor issue a policy; but the secretary wrote the agent that plaintiff must substitute an earthen collar for the sheet-iron one, and procure the consent or authority of the trustees of the building to his obtaining an insurance, and when the company were duly certified that these requisites were complied with, they would send him the policy.

This consent was obtained in writing, and the required alterations made. The plaintiff informed the agent of these facts and requested him to call and see the written assent, and that the requirements had been complied with. This request was constantly repeated during the summer, but not complied with, owing to a press of private engagements. The building was destroyed by fire in April, 1843. After this the agent wrote the defendants, stating the circumstances, and that it was merely through his neglect he had not called on plaintiff, as required, to see the alterations.

By the eleventh by-law, the duty of the agent was to make surveys and receive applications for insurance, and to transmit to the secretary all applications received and surveys made by him.

The facts as to plaintiff's interest were submitted, subject to the question of their relevancy. The building had been originally a church, erected on land given for that purpose. A new church having rendered it almost unnecessary, the members of the congregation, who had obtained a charter for a literary institution, in their individual capacities authorized plaintiff to

repair the building, the expense to be paid out of subscriptions, until which time plaintiff was to hold stock in the new corporation. He also held mechanics' liens for repairs made by himself amounting to \$1,000. After repairing it, plaintiff occupied the building as an academy and dwelling-house. There was also religious worship occasionally in the hall.

By the defendants' charter it was provided that all persons insuring became members of the corporation, whose affairs were to be managed by directors annually chosen by the members. And that every person, before he became a member by insuring, should, before he received his policy, deposit his note, part of which was payable in cash, and the remainder at any time the directors should appoint. *Vide* acts 20th March, 1840, p. 180; April 13, 1838, p. 363. By the act of 1842, p. 426, it was further provided that the company should have a lien for their premium notes on the insured property.

The Court, WOODWARD, P. J., gave judgment for defendants, for reasons of which the following is but an outline. The charter intended policies to be the mode of defining the rights of the insured and their membership of the corporation. That there was peculiar propriety for such a rule here, the members who were liable for the contracts of the company being scattered over the country, and liable to imposition if the naked agreement of the officers of the company bound it. The charter intending a policy as the final consummation of the contract, it was in this case incomplete. Nor would the neglect of the agent to call and examine the alterations be any discharge of the condition precedent of defendant's sending to the company the written authority by the trustees of the building to effect the insurance. Under these circumstances, the company could not have enforced the payment of the note; the answer to that would have been, Our contract is not yet closed. Supposing, therefore, the contract was binding on the corporation, it had not been fully entered into here.

Hamilton, propria persona, for himself.

Armstrong, for the company.

GIBSON, C. J. In commercial towns where the members of the profession are familiar with the law of insurance, actions on mere agreements to insure, whether against fire or perils of the

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sea, are not uncommon. They are noticed in 1 Phillips on Insurance, § 3, p. 9; but it appears that the terms of the contract must have been settled by the concurrent assent of the parties, and that nothing must have remained to be done but to deliver the policy, else the risk will not have been begun; in other words, that the agreement must have had at some particular instant that *aggregatio mentium* which is indispensable in the constitution of every contract. But what are the tests of its presence? In *McCulloch v. The Eagle Insurance Co.* 1 Pick. Rep. 278, the plaintiff wrote to learn the terms on which the defendant would be willing to insure his vessel on a particular voyage, and was answered that it should be done for a particular premium. He immediately sent an order for insurance on the terms proposed; but before it was written, [received,] the defendant had dispatched another letter, declining to take the risk; and it was held, that at no instant had there been a simultaneous expression of assent. On a principle somewhat analogous stands *Cooke v. Oxley*, 3 T. Rep. 653, in which it appeared by the declaration that the defendant had offered the plaintiff a commodity at a particular price provided the latter would give notice of his acceptance before a particular hour of the day; that the notice had been given within the time, but that the article had not been delivered; but judgment was arrested because the plaintiff had not laid a cause of action. This last case is resolvable into the principle that either party may retract his offer while the matter is pending, just as a bid at auction may be retracted before the hammer is down. Such, too, is the principle of *Roulledge v. Grant*, 3 Car. & P. 267, and it is a very practicable one where the negotiation is not carried on through the post-office. But the last case upon the point has overruled *McCulloch v. The Eagle Insurance Company*. In *Adams v. Lindsell*, 1 Barn. & Ald. 681, the defendants had offered to sell the plaintiffs a parcel of wood on terms expressed in their letter, receiving an answer in the course of post. The letter, being misdirected, did not go by course of post; but the plaintiffs wrote as soon as it was received that they would take the wood on the terms proposed. The defendants, however, not having received the answer when they expected to, sold the wood to another. The court said: "That if a bargain could not be closed

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by letter before the answer was received, no contract could be completed through the medium of the post-office. That if the defendants were not bound by their offer when it was accepted, then the plaintiff ought not to be bound till after they had received a notification that the defendants had received their answer and assented to it, and that so it might go on *ad infinitum*. That the defendants must be considered, in law, as making, during every instant their letter was travelling, the same offer to the plaintiffs, and that the contract was completed by the acceptance of it; and that as the delay in notifying it arose from the mistake of the defendants themselves, it was to be taken against them that the answer had been received by course of post." I am unable to see how this conclusion can be resisted. The learned reporter of *McCulloch v. The Eagle Insurance Company* has attempted to distinguish it from *Adams v. Lindsell*, principally on the ground that a treaty respecting insurance is necessarily subject to contingencies whilst it is forming. Undoubtedly. But the question remains, When is it entirely formed? Had their ship returned before the plaintiffs in the former case had answered, they would have been at liberty to decline the offer; but it follows not that they would have been at liberty to retract an actual acceptance before the defendant had received it. The truth is, the two cases are not to be reconciled; and the conclusion is inevitable that an actual concurrence of assent, at any particular moment, is the ruling circumstance, the time of communicating it being comparatively unimportant.

But the contract before us was not negotiated by letter. The plaintiff applied to the defendants' agent for a policy on the Clinton Academy, then occupied by him; paid the requisite proportion of the premium; executed a premium note for the residue; and had a survey made according to the regulations, at his own expense; all which was laid before the company, and referred to its executive committee. The secretary subsequently wrote to the agent requiring the plaintiff to substitute an earthenware stove-pipe collar for his sheet-iron one, and to procure the assent of the trustees of the academy, who held the title, to the contract of insurance; and saying, that being duly certified that these things were done, he would send on the policy. The plaintiff accordingly made the substitution, procured the written

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assent of the trustees, told the agent what had been done, and repeatedly urged him to call at the plaintiff's house and attend to the matter. The agent replied that "he must first bring him that paper of the trustees;" but being requested to call and get it, he promised to do so, yet never did.

It is clear, that the company is to be affected by the acts of its agent within the scope of his authority, as acts done by itself. It appears by the eleventh by-law that his business was to receive applications, take surveys, and forward them, with the cash received and premium note, to the company; and it appears by the letter of the secretary that it was the practice to negotiate the terms of insurance through him, standing in the attitude of an insurance broker. The case then stands thus: The company offered to effect insurance for a certain premium, on performance by the plaintiff of two conditions. These were performed, and the company had notice of it. The company was subsequently requested to call by its agent at the plaintiff's house, to see that the substitution was made, and receive the written assent of the trustees, which it promised to do but did not, and in the mean time the building was burned down. There was no supineness on the part of the plaintiff—at least none which had not been induced by the agent—while the company, on the other hand, was chargeable with positive negligence. Now if I promise to reward a man if he will do me a particular service, and he does it, I am bound to reward him for it, though he had not engaged to do it. The nature of a conditional promise resting on an executory consideration, was explained in *Clark v. Russel*, 3 Watts, 217; and it may be seen from it, that the plaintiff, having actually performed what he had been requested to do, was entitled to have the policy. The terms of the contract were matured when the company had notice that its conditions were performed; and, from that moment, the risk was insured. It would be unconscionable in it to insist upon its own omission to execute the policy, on the ground that the resolution of the trustees had not been handed to its agent, especially as he had prevented the plaintiff from tendering it by promising to call and get it. A parol agreement for a policy, therefore, was completed.

After the decision of the supreme court at Washington, in *The Bank of Columbia v. Patterson's Administrators*, 7 Cranch,

Representations. — Materiality.

299, sanctioned by this court in the *Chestnut Hill & Spring-House Turnpike Company v. Rutter*, 4 Serg. & Rawle, 16, and by many courts in our sister states, it is too late to insist that a corporation can contract only by an instrument under its corporate seal. "When a corporation," said Judge Story, "is acting within the scope of the legitimate purposes of its institution, all *parol* contracts made by its authorized agents are *express promises* of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, are implied promises for which an action lies." It has become a familiar principle, that a corporation may, by the instrumentality of its agent, contract within the sphere of its proper function pretty much as a natural person may. The action in the very case of *McCulloch v. The Eagle Insurance Company* was founded, like the present, on a corporation's *parol* promise; and some years ago, an agreement for a policy against fire was tried before me, and a recovery had without objection on that ground, though the counsel retained by the corporation were among the soundest lawyers at the Philadelphia bar. We say, therefore, that the agreement was complete, and that the plaintiff is entitled to recover on it to the extent of the loss, if the sum insured will reach so far; to be liquidated, if the parties cannot agree, by a writ of inquiry of damages.

Judgment of the common pleas reversed, and judgment *quod recuperet*, rendered by this court.

See note to *Thayer v. Middlesex Ins. Co.*, ante, vol. 1, p. 333; also the exhaustive discussion of the subject in Benjamin on Sale, 30-56.

BOARDMAN vs. NEW HAMPSHIRE MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, New Hampshire, July Term, 1847.)

Representations. — Materiality.

The party assured is bound by the representations upon which the policy has been issued, in those cases only in which the facts represented are material, unless they are expressly warranted to be true, and so become necessary conditions in the contract.

¹ 20 N. H. 551.

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And this is the case whether the representations are contained in a writing referred to in the policy, and in terms made a part of it, or made otherwise than in such writing. Whether a misrepresentation be material to the risk or not, is a question for the jury.

ASSUMPSIT, upon a policy of insurance of a certain brick store of the plaintiff, destroyed by fire on the 21st day of September, 1844.

On the 21st day of August, 1837, the plaintiff made his application, in writing to the defendants, for an insurance upon the building named, which was described in that application as follows: The brick store, corner of Jaffrey and Court streets, 38 by 40 feet, three stories high, two chimneys, six fire-places and stoves, with two open sheds in back, occupied by tenants, including a cabinet-maker tenant in third story; about 50 feet south of shop of J. Judkins, cabinet-maker. Court Street and Jaffrey Street of good widths. No incumbrance.

Upon that application the defendants issued a policy to the plaintiff, who afterwards, and near the time of its expiration, on the 12th day of September, 1843, made application for further insurance upon the same premises, describing them as follows: Store built of brick. For particulars relative to the description of the brick store, reference is had to my application for policy No. 12,018, which was the policy first issued.

At the time when the first application was made the premises insured were occupied as follows, to wit: Third story by a cabinet-maker; second story, southerly half as a school room, and northerly half for the storage of furniture; first story, southerly half as a grocery store, and northerly half vacant.

At the time of the second application, which was that on which the policy was founded which is the subject of the suit, and at the time of the fire by which they were consumed, the premises were occupied as follows: Third story, vacant; second story, southerly half by the artillery company as an armory, and northerly half as a joiner's shop; first story, southerly half as a store for the storage of groceries, and northerly half as a joiner's shop, with a machine moved by horse-power for sawing, grooving, and jointing lumber.

By the terms of the policy, the application is referred to and made a part of the policy.

The by-laws of the company contained, among others, the following provisions: —

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Art. 7. The company will make insurance for the term of six years. The rate of insurance will be in proportion to the exposure and hazard of the property insured to damage or loss by fire, and the premium note or sum to be deposited by the applicant for insurance shall be according to said rate, and the amount insured. Stores may be rated from six to fifteen per cent.; taverns and public boarding-houses, from eight to eighteen per cent.; mills, blacksmiths', carpenters', and cabinet-makers' shops, if taken, from ten to twenty per cent.; goods, stocks in trade, household furniture, and other personal property, shall be rated according to their exposure and liability to damage or destruction by reason of fire; but no risks which should be rated at more than twenty per cent. shall be taken by the company.

Art. 10. The applicant for insurance shall be required to make a true representation of the situation of the property on which he asks insurance, and of his title, &c., &c.

At the trial, the defendants interposed the objection that neither the first application of the plaintiff, nor the second referring to it, gave such a description of the risk to which the property insured was exposed as by law and the by-laws of the company he was required to do in such applications for insurance, in order to render the policy issued thereon binding upon them.

They further objected that the change of the manner of the occupation of the building, between the time of the first and the time of the second application, and of the fire, and the increased risk occasioned by such change, not having been disclosed by the plaintiff, he is not entitled to recover.

The defendants had no knowledge, before the loss, except from the representation contained in the plaintiff's written applications as to the manner in which the building was occupied.

The verdict was taken for the plaintiff by consent of parties, who also agreed to the statement of the case, and to the additional fact that, by the change that was made in the use and occupancy of the building, as stated, the hazard was increased.

Judgment is to be rendered upon the verdict, or the same is to be set aside, as the court may direct.

Perley, for the plaintiff.

Pierce & Minot, for the defendants.

GILCHRIST, J. The plaintiff's application, of the date of the 21st of August, 1837, after stating the size, position, and some other particulars descriptive of the store insured, states that it is occupied by tenants, including a cabinet-maker tenant in the third story.

In the second application, being the one on which the policy in controversy is based, and dated on the 13th day of September, 1843, there is no other description than that which is contained in the words referring to the former application, which are as follows: "For particulars relative to the description of the brick store, reference is made to my application in policy No.12,018."

We may therefore consider that when the plaintiff applied on the 13th of September, 1843, for insurance, he represented the store as occupied by tenants including a cabinet-maker tenant in the third story; and that the policy was issued upon that representation.

In point of fact, that was not a true representation, because, at the time, the third story was vacant. There was a joiner's shop in the first story, and a similar one in the second, and the remainder of the building was occupied by other tenants.

This representation is, by the terms of the policy, made a part of it, and must, of course, be read as if incorporated in it.

Is the misrepresentation contained in the application such as to avoid the policy? Is it to be taken as a condition essential and necessary for the validity of the policy that the building should have been occupied, at the time of the application on which the policy was issued, or at the time when the fire occurred, in the manner in which it was stated in the application to have been occupied?

Parties to insurance, like parties to other contracts, may, without doubt, incorporate into their contracts such conditions, whether apparently material or immaterial, as they see fit. If the assured has, in express terms, stipulated and warranted that a certain fact is true, that warranty makes the fact a material one; and however immaterial it may seem in any other aspect, it is an indispensable condition in the compact. This

principle is fully illustrated by the cases. Such express warranty is always a part of the policy, but like any other part of the express contract, may be written in the margin, or contained in proposals or documents expressly referred to in the policy, and so made a part of it. 1 Phil. Ins. 347, and cases there cited. *Newcastle Fire Ins. Co. v. MacMorran*, 3 Dow, P. C. 255, per Ld. Eldon.

But while this unquestionable effect is given to express warranties or conditions, when ascertained, it is a well established doctrine of the law of insurance, that not every representation made by the assured in his application or treaty for a policy is of that nature. In order to have such an effect, the representation must be material; or, in the language of the author of the treatise last cited, the fact represented must be "one upon which the parties can be presumed to have proceeded in making the contract." Phil. Ins. 410. A false representation cannot avoid the policy, unless it be on a point material to the risk. *Coulton v. Bowne*, 1 Caines, 291; *S. P. Curry v. Com'th Ins. Co.* 10 Pick. 540.

Nor does it appear to be material whether the representations, if not expressly made in the conditions in the contract, are in writing and by words of reference in the policy made a part of the instrument itself, or contained in letters or documents not so expressly referred to. *Snyder v. Farmers' Ins. Co.* 13 Wend. 92; *S. C.* in error, 16 Wend. 481. Nor, indeed, do representations contained in the body of the policy itself amount, in all cases, to express warranties to be literally kept as conditions. An instance of this occurs in the case of *Shaw v. Robberds*, 6 Ad. & Ellis, 75, which was a policy of insurance upon a kiln for drying corn, in use. It appeared on the trial that the kiln was used by the plaintiff for drying corn, but that upon a certain occasion he gratuitously suffered another to dry bark in it, and that the building was in consequence destroyed by fire. The court of K. B. held that such description was no warranty that nothing but corn should be dried in the kiln. Lord Denman said: "No clause in this policy amounts to an express warranty that nothing but corn should ever be ground in the kiln, and there are no facts or rules of legal construction from which an implied warranty can be raised."

So, in *Dobson v. Sotheby*, Mood. & Mal. 90, where a building

was described as a barn, which was in fact of another description. *Catlin v. Springfield Ins. Co.* 1 Sum. 434, is a case to the same point.

There is nothing therefore, in the form in which the description of the building and of its uses is introduced into the transaction between these parties, that shuts out the inquiry whether it was intended and understood by them to be in the nature of an express warranty, or only in the nature of a representation. We must, therefore, look at the whole contract, its terms and its objects, and thus ascertain the meaning of the parties in the particulars referred to.

It can hardly be supposed that it was their intention the plaintiff should be bound by his description to such an extent that its accuracy, in every particular, should form a condition in the contract. If so, its benefits would be forfeited if the third story, which was occupied as a cabinet-maker's shop, which was of a hazardous description, was in fact vacant, although that state of things was clearly for the advantage of the underwriting party. The case of *Catlin v. Springfield Ins. Co.* 1 Sum. 434, was in that particular like the present; and it was held that where the premises were described as "at present occupied as a dwelling-house, but to be occupied hereafter as a tavern," it was a mere representation and not a warranty; and that the risk continued, though the premises were vacant.

We conclude, therefore, that the words in which the application describes the premises as occupied by tenants, including a cabinet-maker tenant in the third story, were merely representation, and not express warranty; and that the plaintiff is bound by them no further than they were material. They were material if they were such as may be supposed to have had a bearing upon the contract, and to have influenced the defendant in adjusting its terms; and a misrepresentation of any fact that is not material, does not, as has been said, avoid the contract.

Whether the misrepresentation was or was not material is a question for the jury. The authorities on this point are numerous. *Flinn v. Headlam*, 9 B. & C. 693; *Hall v. Cooper*, 14 East, 479; *Mackay v. Rhineland*, 1 Johns. Cas. 408; *Williams v. Delafield*, 2 Caines, 329; *Farmers' Ins. Co. v. Snyder*, 16 Wendell, 481; *Curry v. Com'th Ins. Co.* 10 Pick. 540.

Insurable Interest. — Equitable Title.

The case finds that between the time of the first application and the fire a change had intervened in the occupation or use of the building, that increased the risk, and that the plaintiff did not advertise the company of that change. But that, too, was matter for the jury, who might well have found, notwithstanding, that there was such increase of risk as would have been regarded by the parties to have caused a higher rate of premium to have been exacted, according to the rules of the company.

As against the verdict, which involves the consideration of all the questions by the jury, it is not the province of this court to say that either the misrepresentation or the omission was material.

There must, therefore, be *Judgment on the verdict.*

See note to *Pim v. Rogers*, ante, p. 245.

**ADDISON & CLENDENIN vs. THE KENTUCKY & LOUISVILLE
INSURANCE COMPANY.¹**

(Court of Appeals, Kentucky, July 29, 1847.)

Insurable Interest. — Equitable Title.

By the charter of the Kentucky and Louisville Mutual Insurance Company, they may insure estates held by fee simple title, or any less estate; but the nature and extent of the interest insured must be truly set forth.

A failure to express in the policy the incumbrances on the premises avoids the policy by the express terms of the charter.

SIMPSON, J., delivered the opinion of the court.

The plaintiffs in error having procured from the defendants an insurance to the amount of six thousand dollars, on a three story frame building situated in the city of Louisville, known as Atkinson's Mills, brought this action of covenant upon the policy, alleging the destruction by fire of the property insured, and the refusal of the defendants to pay them the loss which they have sustained.

The interest which the plaintiffs had in the property at the

¹ 7 B. Monroe, 470.

time of the insurance is set forth in their declaration, and appears to have consisted in a lien to secure the payment of a debt on John Atkinson, for upwards of nine thousand dollars. The deed by which this lien is secured to the plaintiffs also creates a lien upon the same property in favor of other individuals, to the amount of several thousand dollars, and places the creditors upon an equal footing, no debt having a preference or priority given to it by the terms of the conveyance. The estate of the assured in the property is expressed in the policy as consisting of a mortgage or lien thereon, and the policy purports to have been made for the purpose of covering the sum of six thousand dollars of their interest, but fails to set forth or express the additional incumbrance on the property created by the same deed.

A demurrer to the declaration having been overruled, the defendants filed a plea, alleging in substance that the plaintiffs, not having the legal title to the property insured by the policy, and only having a lien thereon with others named in the same conveyance, fraudulently failed to disclose to the defendants all the incumbrances on the property, and fraudulently failed to have all the incumbrances expressed in the policy, as required by the 13th section of the charter granted to, and incorporating, the company, and of setting forth the names of the persons having the liens, and also alleging that the liens mentioned were existing liens at the date of the policy.

The plaintiffs having filed a demurrer to this plea, which was overruled, they filed a replication, admitting the existence of the alleged liens on the property at the date of the policy, and after denying that they fraudulently failed to disclose to the defendants all the incumbrances on the property insured, alleged that they did in good faith disclose their interest to the defendants at the time the policy was made, and after such disclosure the policy was issued in the shape in which it is presented to the court.

The defendants having demurred to this replication, and the demurrer having been sustained, and the plaintiffs having determined to abide by their replication, and not to plead further, a judgment for the defendants was rendered by the court.

The right of the plaintiffs to a recovery against the defend-

ants depends upon two inquiries: First, was their interest in the property destroyed such as authorized them to effect an insurance thereon? And if it were, is the instrument vitiated by the failure to have the additional incumbrance on the property insured specified and expressed in the policy itself?

The act to incorporate the Kentucky and Louisville Mutual Insurance Company, authorized the company to insure all the real and personal property in the state of Kentucky, except books of accounts, written securities, or evidences of debt, title deeds, manuscripts, or writings of any description, money or bullion, which articles, not being deemed objects of insurance, the company are prohibited to insure. Chemical establishments, oil-mills, alcohol, turpentine, and various other enumerated articles of the same description, are not deemed insurable, on account of their inflammable nature, and under the charter no insurance can be extended to them.

The property insured being an establishment for the manufacture of flour, it is not pretended that it is of a character which precludes its insurance under the charter, but it is urged that the owner alone could have it insured, and that persons having merely a lien on it, to secure the payment of a debt, have not such an interest as authorizes them to effect an insurance on the property.

Any individual having an estate in those erections which are insurable under the charter, whether it be a fee simple title to the property, or any less estate, may, according to the provisions of the charter, have the property insured under the restriction alone, that the true nature and extent of the title, and all incumbrances affecting its value, be fully and fairly expressed in the policy. A lien upon real property to secure the payment of a debt, is clearly an interest therein vested in the creditor, and although it is only an equitable one, there is nothing in the charter which excludes the owners of equitable interests from the benefit of its provisions, or confines them to the owners of legal estates. We are, therefore, of the opinion that the estate which is created by a mortgage on real property, or by a deed giving a lien to secure the payment of a debt, is such an estate as under the charter authorizes an insurance on the property by the holder of the mortgage or lien, and that the plaintiffs had a

right to have the property included in their policy insured, for the purpose of guarding against the loss of their debt by the destruction of the property bound for its payment. A debt is not itself a proper object of insurance, neither is the title to the estate, or any interest which an individual may have in it; but the property itself may be insured as a means of securing the assured by the preservation of the property from the loss of his interest, whatever it may be.

The decision of the next point of inquiry depends on the provisions of the thirteenth section of the act incorporating the company. That act is in the following words: "Said company may make insurance for any term not exceeding ten years, and any policy of insurance issued by said company, signed by the president and countersigned by the secretary, shall be deemed valid and binding on said company in all cases where the insured has a title in fee simple, unincumbered, to the building or buildings insured, and to the land covered by the same; but if the insured have a less title therein, or if the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrance on the premises be expressed therein."

The policy obtained by the plaintiffs contains no specification of the other coexisting liens on the property, and the question arises whether this provision in the charter applies exclusively to the case of an insurance by the legal title holder, or whether it applies to all cases where an insurance is effected. Every reason which requires the legal title holder to state the nature and condition of his title and the existing incumbrances on the property, and to have them expressed on the face of the policy, applies with equal force and urgency to those who do not own the property absolutely, but only an interest in it. And when the extent of that interest is liable to be affected, as in the present instance, by other coexisting liens, which may have the effect of reducing the actual value of the interest of the assured in the property embraced in the policy, even below the sum for which the insurance has been obtained, the propriety of the requisition becomes perfectly obvious. The position is not that merely the incumbrances on the interest or title of the assured should be made known and expressed in the policy. Every

incumbrance on the property, which by its operation necessarily affects the extent and value of that interest or title, must be expressed. The reason of this is perfectly evident. The amount of an insurance is regulated by the value of the interest of the assured in the property. Good faith, therefore, requires that everything known to the assured affecting that value should be fully disclosed and communicated to the insurers.

As the charter explicitly declares the policy void unless the incumbrances on the premises be expressed on its face, and as other incumbrances existed on the property insured besides that held and owned by the plaintiffs created by the same conveyance, and consequently known to them, and calculated seriously to affect the extent of their interest, of which no mention is made in the policy, it results that it is void under the charter, unless the plaintiffs, by their replication, have manifested some reason why the defendant should be liable, notwithstanding this omission in the policy.

Had the replication alleged a full disclosure to the defendants of the nature of the plaintiffs' title to the property, and of the other liens existing upon it, calculated to affect their interests, and a failure on the part of the defendants to insert it in the policy issued by them, it might form a very serious and important question, whether, under such circumstances, inasmuch as the defendants make the policy themselves, an omission on their part to insert in it every fact disclosed by the assured, which was necessary to its validity, should not be regarded as fraudulent, and their liability as existing, if not in a court of law, at least in equity, notwithstanding such fraudulent omission. But as the plaintiffs do not allege in their replication that they disclosed to the defendants the existence of the other liens upon the property, but only alleged that they, in good faith, disclosed the nature of their own interest, which fact is shown by the policy itself, this question is not presented by the pleadings, and consequently is not now decided. As the deed creating the lien formed a part of the plaintiffs' declaration, and showed that other liens had existed on the property besides that of the plaintiffs, which must necessarily have been known to them, and were not expressed in the policy, the dec-

Damages. — Three fourths Value.

laration itself would have been bad, had it shown that those liens were valid and subsisting at the date of the policy. This fact is alleged by the defendants in their plea, and admitted by the plaintiffs in their replication.

Inasmuch, therefore, as the policy sued on is void for failing to mention on its face the coexisting liens on the property insured, and as the plaintiffs have failed to plead any fact which forms a legal excuse for this omission, it follows that the judgment of the court below sustaining the demurrer to their replication is correct.

Wherefore, said judgment is affirmed.

Duncan & Ripley, for plaintiffs.

Guthrie, for defendants.

ABNER POST *vs.* THE HAMPSHIRE MUTUAL FIRE INSURANCE
COMPANY.¹

(Supreme Court, Massachusetts, September Term, 1847.)

Damages. — Three fourths Value.

In cases of fire insurance, the assured is entitled to recover the amount of the real loss sustained by him, if it be within the amount insured, without distinction between a partial and total loss. Therefore, where an insurance was effected for a sum above three fourths the real valuation of the property, in a company restricted to insurance within three fourths the value, and a total loss occurred exceeding in amount the sum insured, *held*, that the assured was entitled to recover a sum equal to three fourths the real value of the property.

THE case is stated in the opinion.

W. G. Bates, for the plaintiff.

R. A. Chapman, for the defendants.

SHAW, C. J. The only question is, for what sum, according to the finding of the jury, judgment shall be entered.

In cases of fire insurance, the insured is entitled to the amount of the real loss sustained by him, if it be within the amount insured, without regard to the distinction between a total and a partial loss, as in cases of marine insurance. *Liscom v. Boston Mutual Fire Insurance Company*, 9 Met. 205.² In the

¹ 12 Met. 555.

² *Ante*, p. 393.

Fire communicated by Locomotive. — Equitable Assignment. — Action.

present case, the insurance was \$500 on the house, which was valued at \$750 and \$500 on furniture, which was not valued. By the charter of the defendants (St. 1829, c. 72), they cannot insure to any amount exceeding three fourths of the value of the property insured; and they, in the rules and regulations adopted by them, reserved a right to have a valuation made anew, in case of loss, without regard to the valuation in the policy. The jury have found the value of the house to be \$600, and of the furniture \$400; and it is conceded by the defendants that the actual loss on each subject exceeded the amount insured. We are of opinion, therefore, that the plaintiff is entitled to recover three fourths of these two sums, — to wit, \$450 on the house, and \$300 on the furniture, — with interest; and the verdict is to be amended, and judgment to be entered accordingly.

LUKE HART *et al.* vs. THE WESTERN RAILROAD CORPORATION.

(Supreme Court, Massachusetts, September Term, 1847.)

Fire communicated by Locomotive. — Equitable Assignment. — Action.

Under the act of 1840, ch. 85, § 1, a person is entitled to recover from a railroad corporation damages caused by fire, though the fire be communicated from a fire in a building on the opposite side of a street sixty feet wide, which latter building took fire from a locomotive owned by the corporation.

The fact that an insurance office has paid a loss occurring in this way will not bar an action by the owner of the building against the railroad corporation also.

The owner of the building in such case becomes trustee of the insurance office; and the latter, by indemnifying the former, may sue the railroad in the former's name.

TRESPASS on the case, upon an agreed statement of facts, as follows: —

On the 9th of July, 1845, a carpenter's shop, owned by William W. Boyington, adjoining the railroad track of the defendants, near their passenger depot in Springfield, was destroyed by fire communicated by the locomotive engine of the defendants. There was a high wind, which wafted sparks from this shop, while it was burning, over Lyman Street, sixty feet, upon the dwelling-house of the plaintiffs, and set it on fire, whereby it was partially consumed.

The plaintiffs were insured by the Springfield Mutual Fire Insurance Company, who requested the plaintiffs to commence a suit against the defendants, to compel payment by them of the plaintiffs' loss, and offered to indemnify the plaintiffs from costs, and to save them harmless in reference to said suit. The plaintiffs refused to commence a suit, as requested, but demanded the amount of their loss of the said insurance company, who paid the same, first notifying the defendants that they did not intend thereby to relinquish any claim which they might have against the defendants for the amount, in their own or in the plaintiffs' names. The insurance company, in the name of the plaintiffs, then brought this action to recover the amount paid by said company to the plaintiffs. After the action was commenced, and before the entry of the writ, the plaintiffs executed an instrument, declaring that they had received payment of their loss, of the insurance company; that they had no claim against the defendants; that they (the plaintiffs) had not authorized the commencement of this action against the defendants, and did not wish to have it prosecuted; and fully releasing any claim which they might have against the defendants on account of said loss.

At the May term of this court, in 1847, the case was opened to the jury, and the defendants presented the aforesaid release from the plaintiffs, and contended that the insurance company, in consequence of this release, could not maintain this action. The court ruled, that receiving payment of the loss by the plaintiffs of the insurance company constituted an equitable assignment, by the plaintiffs, to the company, of any claim they might have had. Whereupon the parties agreed upon the facts before recited in relation to the origin of the fire.

In case the court are of opinion that receiving payment, by the plaintiffs, of the insurance company, amounted to an equitable assignment by them of any claim they might have had against the defendants; that the release referred to was in fraud of the insurance company; and that the defendants are liable for the loss, on the facts stated, the plaintiffs are to have judgment for the sum of \$623.65 damages, and interest on this sum, from the 14th of November, 1845. Otherwise, the plaintiffs are to become nonsuit.

Fire communicated by Locomotive. — Equitable Assignment. — Action.

J. Willard & R. A. Chapman, for the plaintiffs.

Phelps, for the defendants.

SHAW, C. J. This is an action of first impression, and is, we believe, the first brought upon the St. of 1840, c. 85, involving the present question. The action is brought, in fact, by the Springfield Mutual Fire Insurance Company, for their own benefit, in the name of the present plaintiffs, under the circumstances mentioned in the agreed statement of facts, on which the case was submitted to our decision.

1. The first question in order, it appears to us, is, whether, upon the facts stated, the defendants were liable to anybody, and for any loss, by force of St. 1840, c. 85; the defendants insisting that the case is not within the statute. The statute provides, § 1, that, "when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible, in damages, to the person or corporation so injured."

It is contended that the plaintiffs' building was not burnt by fire communicated by a locomotive engine, within the meaning of the statute. And the case certainly presents a question of great importance, and of great difficulty. On the one hand, if the word "communicated" is used in the broad sense in which, without force or violence done to the language, it may be, to include all burnings, when a fire is communicated by the engine directly to one building, and thence by natural and ordinary means extending to others, without the intervention of any other means, the effect would be to charge the railroad company with damages to an unlimited amount, when a fire, thus originating in a village or city, has spread into a wide conflagration. The argument is earnestly urged, that the legislature could not have intended to impose a responsibility so serious and alarming; and it is insisted that the term "communicated" will bear, and ought to receive, a construction more limited, so as to restrain the operation of the statute to the case where the very particles of fire which fall upon, and kindle the flame in, the building burnt, must have emanated from the engine itself, without the intervention of any other object. If so restricted a sense as the latter had been intended by the

legislature, it seems strange that they did not add some qualifying word, as "immediately" or "directly," to the word "communicated." Perhaps some light may be derived from a subsequent clause in the same section of the statute, which provides, that "any railroad corporation shall have an insurable interest in the property for which it may be so held responsible in damages, *along its route*, and may procure insurance *thereon* in its own behalf." These latter words, we think, describe buildings being near and adjacent to the route of the railroad, so as to be exposed to the danger of fire from engines, but without limiting or defining any distance. In this view of the statute, it seems difficult to lay down any general rule. From the language made use of, we cannot think it was intended to limit its operation to the very first building which might be touched with a spark or other fire from the engine, and not extend it to another building, contiguous though it may be, but belonging to another owner, which must necessarily burn with it.

In the present case, the fire was transmitted, by ordinary and natural means, from the shop first touched by sparks from the engine, to the plaintiffs' dwelling-house, immediately across a street not very wide. The building burnt was, then, near the route of the railway. Under these circumstances, the court are of opinion, that the plaintiffs' house was injured by fire communicated by the locomotive engine of the defendants, within the true meaning of this statute, and that they are thereby held responsible in damages to the plaintiffs, the persons injured.

2. The next question is, whether the insurance company, having, pursuant to their contract of indemnity, paid the loss to the plaintiffs, are entitled to maintain this suit in the plaintiffs' name, but for their own benefit, to recover the damages to which the defendants are liable by the statute.

We consider this to be a statute purely remedial, and not penal. Railroad companies acquire large profits by their business. But their business is of such a nature as necessarily to expose the property of others to danger; and yet, on account of the great accommodation and advantage to the public, companies are authorized by law to maintain them, dangerous though they are, and so they cannot be regarded as a nuisance.

The manifest intent and design of this statute, we think, and its legal effect, are, upon the considerations stated, to afford some indemnity against this risk to those who are exposed to it, and to throw the responsibility upon those who are thus authorized to use a somewhat dangerous apparatus, and who realize a profit from it. This indemnity, provided by law against a special risk, may be considered as a quality annexed to the estate itself, and passing with it to any and all persons who may stand in the relation of owners, however divided and distributed such ownership may be. The effect of the statute is to diminish the specific risk to which such buildings may be exposed, from their proximity to the railroad, and in this respect to put them upon an equality with other risks.

Now, when the owner, who *prima facie* stands to the whole risk, and suffers the whole loss, has engaged another person to be at that particular risk for him, in whole or in part, the owner and the insurer are, in respect to that ownership and the risk incident to it, in effect one person, having together the beneficial right to an indemnity provided by law for those who sustain a loss by that particular cause. If, therefore, the owner demands and receives payment of that very loss from the insurer, as he may, by virtue of his contract, there is a manifest equity in transferring the right to indemnity, which he holds for the common benefit, to the assurer. It is one and the same loss, for which he has a claim of indemnity, and he can equitably receive but one satisfaction. So that, if the assured first applies to the railroad company and receives the damages provided, it diminishes his loss *pro tanto*, by a deduction from, and growing out of a legal provision attached to and intrinsic in, the subject insured. The liability of the railroad company is, in legal effect, first and principal, and that of the insurer secondary; not in order of time, but in order of ultimate liability. The assured may first apply to whichever of these parties he pleases; to the railroad company, by his right at law, or to the insurance company, in virtue of his contract. But if he first applies to the railroad company, who pay him, he thereby diminishes his loss, by the application of a sum arising out of the subject of insurance, to wit, the building insured, and his claim is for the balance. And it follows, as a necessary conse-

quence, that if he first applies to the insurer, and receives his whole loss, he holds the claim against the railroad company in trust for the insurers. Where such an equity exists, the party holding the legal right is conscientiously bound to make an assignment, in equity, to the person entitled to the benefit; and if he fails to do so, the *cestui que trust* may sue in the name of the trustee, and his equitable interest will be protected.

But we think this position is exceedingly well sustained by authorities. A case, very much in point in principle, is that of *Mason v. Sainsbury*, first reported as a manuscript case in Marshall on Insurance (1st Amer. ed. 691), and since in 3 Doug. 61. It was an action against the hundred, brought on the riot act, to recover damage sustained by the plaintiff in the riots of 1780. The plaintiff had an insurance on which he had recovered, the insurance office having paid him without suit; and this action was brought in the name of the plaintiff, with his consent, for the benefit of the insurance company. It was decided by Lord Mansfield and the whole court, that the plaintiffs were entitled to recover. Buller, J., said it was to be treated as an indemnity, in which the principle is, that the insurer and the insured are as one person, and the paying by the insurer, before or after, can make no difference. The same doctrine was fully recognized by the court of king's bench, in 1823, in the case of *Clark v. The Hundred of Blything*, 3 Dowl. & Ryl. 489, and 2 Barn. & Cres. 254. It goes upon the ground, that the hundred are liable at all events, and the private contract of insurance, dividing the risk, makes no difference in the owner's right to recover. It was likened by Lord Mansfield and Ashhurst, J., in 3 Doug. 61, to the case of abandonment, in marine insurance, where the insurer is constantly put in the place of the insured.

A similar case afterwards came before the court of common pleas, in 1838, and was very elaborately argued, and the principles above stated confirmed. *Yates v. Whyte*, 4 Bing. N. C. 272, and 5 Scott, 640. It was a case of collision at sea, in which the plaintiff claimed damages, sustained by reason of the defendant's vessel having run foul of his vessel, through the defendant's negligence. The plaintiff had recovered of the underwriters on his vessel a certain sum for the same loss, and

the defendant contended that this sum should be deducted; but it was held that this was no answer, and that the sum thus paid by the insurers ought not to be deducted. This case was also distinguishable from the former in this respect; that, in this the suit was not brought at the instance of the insurers. But the court clearly intimated that the owners, having an absolute right, could recover their damages in that suit, and that if, under an indemnity against the same loss, he had already received payment, the money recovered in this suit would be held in trust for the insurers who had thus paid. It would be in the nature of salvage, received by the assured after payment of a total loss. This was distinctly held by Lord Hardwicke, in *Randal v. Cockran*, 1 Ves. Sen. 98. Where owners of vessels unjustly captured by the Spaniards had received compensation from the underwriters, and afterwards, upon letters of marque and reprisal, granted by the government against the Spaniards, the owners received compensation, it was decided that the owners held the money, so received, in trust for the underwriters, in the nature of salvage. This was a case in chancery; but where the same principle can be carried into effect in the ordinary forms of proceeding, in a court of law, the same principle will be applied. If the trust consists in an equitable liability to pay money, it will be recognized and enforced in a suit at law.

It is clear that the assured has a right to recover against the insurer, although he has a remedy, at the same time, against the party by law liable. Thus, in *Cullen v. Butler*, 5 M. & S. 466, it is stated by Lord Ellenborough, that it is no objection to the plaintiff's right to recover of the underwriter, that he may have a right also to recover against the person by whose immediate act the damage was occasioned. This being true, and it being also true that a recovery against the underwriter is no bar to a suit by the assured against the party primarily liable, it follows, as a necessary consequence, that after a payment by the insurer, by compulsion of legal process or voluntarily, the assured becomes trustee for the insurer, and by necessary implication makes an equitable assignment to him of the right so to recover. See opinion of Kent, C. J., in *Gracie v. New York Ins. Co.* 8 Johns. 245.

Indemnity. — Instruction to Jury.

There is a more recent case bearing upon the question of the right of underwriters, after payment of a loss, to claim salvage, obtained by the assured, the result of which may seem opposed to the above cases, because the underwriters did not recover back. *Brooks v. McDonnell*, 1 Y. & Coll. Exch. Rep. 500. But it will appear from that case that the doctrine herein above stated was affirmed at the bar and by the court; and that the case was decided upon the ground that an abandonment had been refused, and a certain sum had been paid by agreement, as a compromise of all claims on both sides.

In regard to the right of the insurance company to sue in the name of the assured, we think the cases fully affirm the position, that by accepting payment of the insurers, the assured do implicitly assign their right of indemnity, from a party liable, to the assured. It is in the nature of an equitable assignment which authorizes the assignee to sue in the name of the assignor for his own benefit; and this is a right which a court of law will support, and will restrain and prohibit the assignor from defeating it by a release. The formal discharge, therefore, given by the nominal plaintiffs is not a bar to the action. See *Payne v. Rogers*, 1 Doug. 407; *Whitehead v. Hughes*, 2 Crompt. & Mees. 318; *Phillips v. Clagett*, 11 Mees. & Welsb. 84; *Timan v. Leland*, 6 Hill, 237; *Browne on Actions*, 105.

Judgment for the plaintiffs.

See *Quebec Fire Assur. Co. v. St. Louis*, Ill. 333 (1865); *Connecticut Life Ins. Co. v. Moore* P. C. C. 286 (1851); *Rockingham v. New York & New Haven R. Co.* 25 *Mut. Fire Ins. Co. v. Boshier*, 39 Maine, Conn. 265 (1856). 253 (1855); *Peoria Ins. Co. v. Frost*, 37

THE FRANKLIN FIRE INSURANCE COMPANY vs. ALEXANDER HAMILL.¹

(Court of Appeals, Maryland, December, 1847.)

Indemnity. — Instruction to Jury.

A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing to show the loss less

¹ 6 Gill, 87.

Indemnity. — Instruction to Jury.

than that claimed would be admissible. The doctrine relative to mitigation of damages has no application to such a case.

In an action of covenant where the plaintiff was not entitled to recover unless he proved that the property insured was destroyed by fire ; that notice of the loss, and an estimate of damage sustained, were furnished the underwriter, according to the terms of the policy, it is error in the county court to instruct the jury, that the plaintiff is entitled to recover, in such a form as to take from them the consideration of the fact — when the fire occurred, and assume the day, or that notice of the disaster was forthwith communicated, and a particular account of loss furnished to the company.

THIS was an action of covenant, commenced on the 30th August, 1842, by the appellee against the appellant, to recover for a loss by fire, under a policy of insurance of the appellant. The defendants below pleaded that they had not broken their covenant ; and the parties agreed that “ all errors in pleading are released, and any matter may be given in evidence under the above plea, which might be given in evidence under any other plea, or pleaded : *provided*, notice in writing of the substance of such defence be given four weeks before the trial.”

At the trial, the plaintiff offered in evidence the policy of insurance in this case, which it was admitted was executed by the defendants ; the destruction by fire of the building, in which the property insured by the policy in this case, viz. : a steam-engine, and the machinery of a plaster-mill, was situated ; that it was damaged by fire, which occurred on the 20th June, 1842 ; an estimate of the loss by fire, made out by one Cassidy, which was left with the defendants on the 15th July, 1842, and amounted to \$4,140.47. The policy required that all persons insured, sustaining any loss or damage by fire, are forthwith to give notice to the secretary, and as soon as possible after, to deliver in as particular an account of their loss or damage as the nature of the case will admit of ; and to produce to the company satisfactory proof thereof ; and the plaintiff proved by said Cassidy that said estimate contained, in his judgment and opinion, the fair and just value of the loss sustained by the plaintiff from said fire. And further proved, by said Cassidy and other witnesses, that in the judgment of Cassidy and of said witnesses, the engine and machinery of the plaintiff, damaged by said fire, was, before said fire, worth from \$3,500 to \$4,000.

The defendants offered to give evidence by Francis H. Smith, the agent of the defendants, by parol, that within two days after the fire occurred in this case, the plaintiff called at the office

of the defendants, and notified said witness of the fire; that said witness informed the plaintiff that he must make out his estimate of loss; that within two or three days after said fire occurred, the said Smith, as agent of the defendants, examined the damage done to the property of the said plaintiff, insured by the policy in this case, and finding the damage trifling in comparison with the sum insured by said policy, elected, in behalf of defendants, to repair said insured property, under the provisions in the policy, and notified said plaintiff of such election; and informed the plaintiff, within three days from the occurrence of said fire, that the defendants were then ready to repair said insured property within the time provided in the policy; but that if said property should be repaired before the building in which the same was to be repaired and put up was roofed in and repaired, that said insured property, so repaired, would be liable to injury from exposure to weather, &c.; and that at said interview between said plaintiff and the agent of the defendants, as also at several other interviews, it was distinctly agreed and understood between them, that for the benefit of said plaintiff, and to preserve his property from such damage by weather, &c., that the time within which said insured property was to be repaired and restored, according to the provisions contained in the policy in this case, should be enlarged and extended, and the repairs and restoration of said insured property dispensed with, and postponed until the building, in which the same was located, should be repaired and made fit to receive said insured property; that in pursuance of said last mentioned agreement, said witness went on to repair said building with all possible dispatch; that within three days after said fire, said witness employed Wells, Miller & Clark, machinists, to repair said insured property, who took said property in charge; and that as soon as said building was roofed in and repaired, said insured property was repaired, and put in as good order and condition as it was before the said fire, and tendered the plaintiff by the following letter: —

“ AGENCY FRANKLIN FIRE INSURANCE CO.,

“ BALTIMORE, 7th October, 1842.

“ ALEXANDER HAMILL, Esq. — Dear Sir: I have to inform you that the engine and plaster-mill insured for you in this

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office, which was lately damaged by fire, is now in complete repair and ready for you. Should any part of the work not meet your approbation, you will please point it out, and if the complaint be well founded, it shall be attended to.

“ F. H. SMITH, *Agent*.

(Indorsed.) “ *Alexander Hamill, Esq., present.*”

But that he refused to receive the same by his reply to said letter: —

“ Sir: I have your extraordinary note of 7th October, given me, after your company had violated every engagement, and after a controversy pending for the recovery of the amount of your insurance and suit instituted for redress. I hardly expected that you would have added insult to injury; but after the course you have pursued, what should I not expect from you?

“ Your ob’t servant,

ALEXANDER HAMILL.

“ Oct. 8th, 1842.

(Indorsed.) “ *Francis H. Smith, Esq., Agent of Franklin Fire Insurance Company, present.*”

That two or three days after the time limited for the repair of the insured property specified in the policy had elapsed — that is to say, on the 20th August, 1842 — Mr. Glenn, as counsel for the plaintiff, called at the office of the defendants and demanded the payment of the amount insured by the policy, when he, the witness, informed said counsel of the agreement between said plaintiff and defendants, enlarging the time for the performance of the said repairs, &c.

The witness also stated, that the defendants had a policy on the said house at the time of the fire, and elected to repair the same. The defendants further offered in evidence by Wm. C. Neale, that he was at the time of said fire clerk for the defendants; and that he, the witness, was present at frequent conversations at different times, between the plaintiff and Mr. Smith, the agent of the defendants, one of which occurred the day after the fire, in which it was agreed and understood between said plaintiff and said agent, that the time limited in the policy in this case, for the repairs and restoration of the property insured by the policy of insurance in this case, should

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be enlarged and extended; and that said repairs and restoration of said insured property should be postponed, until after the roofing in and repairing the building in which said insured property was located; that the defendants were ready at any time after said fire occurred to repair said insured property, and offered the plaintiff to repair said property in the presence of the witness, which offer said plaintiff declined, and preferred that said property should not be repaired and restored until after the building, in which the same was located, should be roofed in and repaired; and that in consequence of said arrangement, said insured property was not repaired within the time limited in the policy.

The defendants further offered in evidence by Wells and Thomas J. Matthews, practical machinists, that they were employed by the defendants to repair the steam-engine and machinery, which was the subject matter of insurance in this case; that said insured property was put into the hands of said witnesses for repairs, within two or three days after the fire occurred, and they commenced said repairs forthwith, and prosecuted the same, from time to time, as their convenience permitted; that they did not hurry the execution of the said repairs, because they were informed by the agent of the defendants, that there was no need of hurry, and that said repairs were fully finished and completed, and put in as good order and condition as the said insured property was before said fire occurred (if not in better condition), by the 3d October, 1842; and that the whole cost of said repairs was \$350, which was paid by defendants; that said plaintiff was notified, by letter from the said agent of said defendants, dated 7th October, 1842, that said insured property was ready for said plaintiff. The said witness of defendants also stated upon cross-examination, that he had no recollection that after said estimate of loss was left with the defendants on the 18th July, 1842, as aforesaid, any other conversation was had between plaintiff and said Smith, in relation to any agreement to waive the time for repairing said insured property, as such time is limited by the policy, and by said witness, as well as by said Smith; that after Mr. Glenn, as the attorney of the plaintiff, demanded payment of said loss, on the 20th August, no understanding or agree-

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ment was had between plaintiff and defendants, in regard to any such waiver, but neither of said witnesses ever heard from plaintiff within thirty days after notice of loss as aforesaid, that he would not waive said time for such repairs. And the plaintiff gave in evidence that he consulted said Glenn, as counsel, in relation to said claim, and that under the advice of said Glenn, said estimate of loss was made out and left with the defendants' said agent, so as to authorize plaintiff to recover the amount of said loss, after the end of thirty days from the leaving of said estimate with the defendants.

The defendants also gave in evidence, that notwithstanding the leaving of such estimate of loss, and the demand of payment by said Glenn, as attorney of plaintiff, on the 18th July, and 20th August, 1842, respectively, the defendants, nor said Smith did not proceed to repair said loss within thirty days from either period, although the same could have been repaired at any time within ten days; nor did he, they or said agent, then direct said Wells, Miller & Clarke to make such repairs with practical expedition.

The plaintiff further gave in evidence, that said insured property was not fully repaired, but stood in need of some \$30 or \$40 of additional work, in order to place the same in working condition, and that the same was, after being repaired as aforesaid, sold at public auction under a distress for two quarters rent due by the plaintiff, one half of which accrued after said fire, and brought the sum of \$240.

The plaintiff prayed the court to instruct the jury as follows: —

1st. "That the plaintiff is entitled to recover the amount of damage he actually sustained by the fire, which occurred on the 20th July, 1842, if the jury believe that his loss was not repaired by the defendants within the time stated in the policy, and has not since been paid, and that no parol evidence is admissible to show that said Hamill consented, in opposition to the terms of said policy, to allow such repairs to be made at any time after the period specified in such policy.

2d. "That even if such parol evidence were admissible, the delivery to said defendants of an estimate of loss, the demand of payment and institution of suit was a rescission of such

arrangement, and unless defendants repaired or paid as aforesaid within thirty days after such rescission, plaintiff is entitled to recover for the actual loss sustained by him by said fire."

The defendants prayed the court to instruct the jury as follows:—

1st. "That the testimony of F. H. Smith and W. C. Neale, in relation to the agreement between the plaintiff and the agent of the defendants, for the extension and enlargement of the time specified in the policy of insurance in this case, for the completion of the repairs, &c., of the subject matter of insurance, in case of loss or damage, is admissible for the purpose of proving that said time was, by such agreement, enlarged and extended.

2d. "That if the jury believe the testimony of Smith and Neale, mentioned in the first prayer, the plaintiff is not entitled to recover in this case.

3d. "If the jury believe from the evidence, that after the loss by fire in this case, and before the expiration of the period specified in the policy for the repairs or restoration of the subject matter of insurance, it was agreed between the plaintiff and the agent of the defendants, with a view to the interest and advantage of the plaintiff, that the time for said repairs and restoration of the subject matter of insurance should be enlarged and extended, until the building in which said subject matter of insurance was located could be repaired and made fit for the reception of said subject matter of insurance; and that the defendants, relying upon such agreement without any notice to the contrary from plaintiff, failed to have the said repairs, &c., made within the period specified in said policy; that the plaintiff is not entitled to recover in this case.

4th. "That the testimony of Smith and Neale, in reference to the agreement mentioned in the first prayer, is admissible in mitigation of damages."

The court (Le Grand, A. J.) granted the plaintiff's first prayer, but refused the second, and refused all the defendants' prayers, to which granting of the plaintiff's first prayer, and refusing to grant the defendants' prayers, the defendants excepted.

The defendants below prosecuted this appeal.

The cause was argued before DORSEY, CHAMBERS, MAGRUDER, and MARTIN, JJ.

Teackle & McMahan, for the appellants, and
Meredith & Reverdy Johnson, for the appellees.

MARTIN, J., delivered the opinion of this court.

In this case an action of covenant was instituted by the appellee against the appellants, on a policy of insurance against loss by fire, executed by the insurance company on the 14th May, 1842.

The defendant pleaded *non infregit conventionem*, to which was annexed the following agreement, signed by the counsel in the cause: —

“ All errors in pleading are released, and any matter may be given in evidence under the above plea, which might be given in evidence under any other plea or pleas: *provided*, notice in writing of the substance of such defence be given four weeks before the trial.”

It does not appear from the record that notice in writing was given by the defendants, of the defence on which they intended to rely, as required by the agreement, and the case stands on the plea of *non infregit conventionem*.

In this condition of the pleadings, it is clear that the parol agreement for the extension of the time within which the property might be repaired by the insurance company, according to the stipulations of the policy, was inadmissible, as there was no plea to which it could be applied.

The court, therefore, committed no error in rejecting the defendants' first, second, and third prayers.

The court below were also correct in rejecting the defendants' fourth prayer.

In a contract of indemnity, like the one under consideration, the right to recover must be commensurate with the loss actually sustained by the plaintiff, and any evidence conducing to show that the damage consequent upon the fire was less than that claimed by the plaintiff, would be admissible, but the doctrine relative to the mitigation of damages has no application to a case of this description.

The plaintiff, in his first prayer, asked the court to instruct the jury: “ That he is entitled to recover the amount of dam-

age he actually sustained by the fire, which occurred on the 20th July, 1842, if the jury believe that his loss was not repaired by the defendants within the time stated in the policy, and has not since been paid; and that no parol evidence is admissible to show that said Hamill consented, in opposition to the terms of the said policy, to allow such repairs to be made at any time after the period specified in said policy."

By the eighth article of the policy it is stipulated: —

"That all persons assured by the company, sustaining any loss or damage by fire, are forthwith to give notice to the secretary, and as soon as possible after deliver in as particular an account of their loss or damage as the nature of the case will admit of, and to produce to the company satisfactory proof thereof."

It is evident that the plaintiff in this case was not entitled to recover unless he proved that the property insured was destroyed by fire, and that notice of the loss was given, and an estimate of the damage sustained furnished to the company, as required by the eighth article of the policy of insurance. And, although the court were correct in deciding that the parol agreement was inadmissible under the pleadings in the cause, yet they erred, we think, in granting the prayer, because, by so doing, they assumed as facts questions which should have been submitted to the consideration of the jury. The cases of *Crawford v. Berry*, 6 G. & J. 71, and the *Charleston Insurance Company v. Corner*, are conclusive on this point.

In the last case the court says: —

"The first and second instructions are, in effect, an assertion by the court, that the 'Eliza Davidson' was captured and detained by the 'Pearl;' and in the third instruction, that the 'Corrientes' was blockaded on and after the ship's release at Montevideo. Doubtless the jury would have found these facts according to the testimony, but the sufficiency of evidence to satisfy the jury, or the circumstance that it is all on one side, does not authorize the court to instruct the jury that it proves the fact. They have the power to refuse their credit, and no action of the court should control the exercise of their admitted right to weigh the credibility of evidence. In thus incautiously expressing their opinion the court erred."

Damages. — Dutiable Goods.

It is apparent from an examination of this prayer, that the court, by instructing the jury that the plaintiff was entitled to recover, assumed the fact that a fire occurred on the day mentioned in the prayer, and also that notice of the disaster was forthwith communicated to the secretary of the company, and a particular account of the loss or damage sustained by the plaintiff delivered as soon as possible after the fire, in conformity with the stipulations of the contract. These are questions for the consideration of the jury, and the court erred in granting the prayer.

The judgment of the county court is, therefore, reversed. But we desire to be understood as expressing no opinion on the question, whether the parol agreement offered in evidence by the defendants would have been admissible in a different condition of the pleadings.

Judgment reversed and procedendo awarded.

WOLFE v. HOWARD INSURANCE COMPANY.¹

(Superior Court, New York City, December Term, 1847.)

Damages. — Dutiable Goods.

The insurer of imported dutiable goods, destroyed before the payment of the duties, is liable for the value of the goods as if the duties had been paid; and this too though the consignee or importer has executed no bond or security to the government.

THE case is stated in the opinion.

F. B. Cutting, for the plaintiff.

S. A. Foot, for the defendants.

By the Court, VANDERPOEL, J. The only question presented is, whether the plaintiff was entitled to recover the value of the goods destroyed, including the duties, which, by the law of congress, were chargeable upon them.

The goods in question were stored under the 12th section of the tariff act of 1842 (Laws of Congress of 1842, page 194), which provides, that all duties shall be paid in cash, and that in all cases of neglect to pay the duties, the goods shall be taken

¹ 1 Sand. 124.

possession of by the collector and deposited in the public stores, there to be kept at the charge and risk of the owner, importer, consignee, or agent; and if such goods remain in the public stores beyond sixty days, without payment of the duties, then they may be sold by the collector at auction; he to pay out of the proceeds of the sale the duties, storage, and interest at six per cent.

On the argument, reference was made to the sixty-second section of the act of the 2d March, 1799, Laws of the U. S. chap. 128, § 62, which provides that on wines and distilled spirits, the importer, at his option, may give a bond to the collector for the duties without surety, for double the amount of the duties, provided the wines or spirits be deposited *at the expense and risk of the importer*, in a store to be agreed upon by the inspector.

The counsel of the defendants seem to suppose that this section is still in force. The act of 1846, section 26, repeals all former laws inconsistent with its provisions. The twelfth section of the act of 1842 applies to all imported goods, after first fixing a duty on all wines and distilled liquors, and requires an immediate payment of the duties in cash; or in the alternative authorizes the collector to put them in a public store and sell them for duties, after the expiration of sixty days. The sixty-second section of the act of 1799, relative to distilled spirits, would therefore seem to be repealed. But whether repealed or not, is wholly immaterial in reference to the question, now involved. The sections of both acts equally present the question, whether the government is entitled to the duties when the goods are destroyed by fire in a public store; and upon the result of this inquiry depends the question, whether the plaintiff is entitled to recover the actual cash value of the property, including the duties.

The case of *The United States v. Lyman*, Mason, 482, was an action of debt brought by the United States for the amount of duties on 500 chests of tea, imported into the port of Boston, in 1816. It appeared that the defendant imported the teas. After their arrival and the entry of the ship, the teas were on the 8th of July purchased by one Warner Lovejoy, who gave bonds at the custom-house in the usual form, upon a deposit of the teas; and afterwards, upon giving other bonds as usual, was

Damages. — Dutiable Goods.

permitted to receive the tea again. They were then redelivered to and sold by the defendant. The question then was, whether the importer was liable for the duties; and it was held by Story, J., that immediately on the importation of the goods, the duties to the government became a personal charge and debt on the importer. Judge Story lays considerable stress on the phraseology of the act of the 27th of April, 1816, chap. 107, under which that action was brought. The words there are, "There shall be levied, collected, and paid, the several duties, &c., when imported into the United States." The words of the fourth section of the act of 1842 are quite as pointed as those quoted. It provides that "there shall be levied, collected, and paid, *on the importation* of the articles thereafter mentioned, the following duties," &c. The learned judge, in the above case, justly remarks that it has been repeatedly settled, both here and in England, that under such circumstances, the duties are a debt accruing to the government from the time of the actual importation of the goods. In the case in *Mason*, it was also held, that a bond taken to secure the duties is not an extinguishment of the debt, but merely collateral security for its payment. See *Knox v. Devens*, 5 *Mason*, 380; also the case of *The United States v. 350 Chests of Tea*, 12 *Wheat*. 487, where it was held that the lien of the government for duties attaches upon the goods from the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the custom-house officers.

It is clear, then, that the plaintiff is liable to the government for the duties, and that the destruction of the goods by fire, while in the public store, is not, in law, a bar to the claim for duties which the government has against him personally. The community, as well as congress, have frequently acted on the principle, that the importer is not the less liable for duties, because the goods have been destroyed by fire; the former by petitioning for, and the latter by passing acts to remit duties upon goods destroyed by fire. The act to remit the duties upon goods destroyed by the great conflagration in this city in December, 1835, is a striking and memorable example. It is not competent for the defendants here to say to the plaintiff: The government will not probably enforce its claim against you, and,

Reassurance. — Insolvency.

therefore, we are not liable. It is enough that the plaintiff was liable for the duties the moment the goods were imported; and the defendants cannot escape liability on the hypothesis that the United States may possibly omit or neglect to insist upon its rights. Policies against fire are personal contracts with the assured; *Etna Fire Insurance Company v. Tyler*, 16 Wend. 397; and the insurers cannot escape liability on the ground that the assured have not paid to third persons all they are liable to pay on account of the goods. This is a matter with which the former have no concern.

Motion to set aside report of referees denied.

HONE & BOKEE, Receivers, vs. THE MUTUAL SAFETY INSURANCE COMPANY.¹

(Superior Court, New York City, December Term, 1847.)

Reassurance. — Insolvency.

The object of reassurance is to throw the risk of the insurer upon other underwriters; and in case of loss, the reassurer pays the whole amount which the insurer incurs. Parol evidence of a custom in New York, at variance with this principle, will not be received.

In a case of reassurance, the original insurer is not bound to pay the loss before he can maintain an action against the reassurer, and the solvency or insolvency of the former is immaterial.

THE case is stated in the opinion of the court.

B. D. Silliman & O. Hoffman, for the plaintiffs.

T. Sedgwick, for the defendants.

By the Court, SANDFORD, J. The defendants entered into a contract with the corporation represented by the plaintiffs, by which they agreed to pay to that corporation such loss or damage by fire, not exceeding \$10,000, as might occur to the merchandise of Herckenrath & Van Damme, within one year from May 4th, 1845. In July, 1845, more than \$10,000 of the merchandise so insured was destroyed by fire. The requisite proofs of the loss were made to the defendants, and were satisfactory. It would seem to follow, that they should pay the \$10,000 to

¹ 1 Sand. 137.

the plaintiffs, according to what is undeniably the clear, distinct, and unequivocal terms of their agreement.

But the defendants invoke in their behalf an usage among insurers in this city, which, if valid, greatly modifies the effect of the policy of reinsurance. By this usage, as it is claimed, the reinsurer pays to the first insurer only so much of the sum re-insured as bears the same proportion to the whole property destroyed which was covered by the first insurance, as the whole reinsurance bears to the original insurance. In other words, if A. write a policy for \$20,000, and then procure B. to reinsure him for \$10,000 on the same property; in the event of a loss occurring to the amount of \$10,000, B. will be liable to pay to A. \$5,000 only, instead of the \$10,000 expressed in his policy.

That the usage exists among insurers, we are to assume for the disposal of this case. For if the testimony adduced in its support be unsatisfactory as to its existence, we ought to permit the defendants to give farther evidence. If the usage when established be inadmissible, there is no occasion for farther testimony on the subject.

The question is thus fully presented upon the admissibility of this usage, to affect the rights of the parties.

In order to satisfy ourselves on this point, we have first endeavored to ascertain what the law merchant declares respecting the contract of reassurance. In this pursuit we have availed ourselves of the learning of continental Europe, as well as the English treatises on insurance; the general principles of commercial law being common to all civilized countries.

For more than two centuries, the contract of reassurance has been well known, and its principles firmly established; and we have not met with a single treatise or decision which deviates from the uniform doctrine maintained on the point in question. From *Le Guidon de la Mer*, to the last edition of Mr. Justice Park's work in England, and the publication of M. d'Alauzet in France, the contract of reassurance is described as a contract of indemnity to the party obtaining it; and in all the modern treatises such indemnity is explicitly declared to be the whole sum reinsured.

The celebrated *L'Ordonnance de la Marine* of Louis 14th, enacted in 1681, in authorizing reassurance, describes it as an

indemnity; and Valin, the learned commentator on the Ordinance, says this provision was framed from articles 19, 20, of chap. 2, of *Le Guidon de la Mer*. 2 *Commentaire sur L'Ordonnance de la Marine*, par Valin, liv. 3, t. 6, art. 20. The section in *L'Ordonnance* is made the text of all the French writers on this subject to the present day.

Emerigon, whose *Traité des Assurances* is of the highest authority, and is the subject of the eloquent eulogy of Chancellor Kent, indorsing the equally strong commendation of Lord Ten-terden, is entirely clear and positive as to the obligations of the reassurer. He says that in case of loss he is held to pay the whole amount for which he is reassurer, without any regard to the circumstance that the reassured may have procured an abatement from the first insured, or may be unable, because of bankruptcy, to pay the latter in full. Emerigon, tom. 1, ch. 8, § 14, page 247 to 250. He cites two decisions to this effect made in the courts of France, one in 1748, the other in 1780.

Roccus is equally explicit that the reassurer is to pay the whole loss which is incurred by the first insurer; and his language is quoted by Emerigon and the subsequent authors. Roccus, *Resp. leg. de Assecurat.* not. 12.

Casaregis, Disc. 1, No. 67, "soutient le même opinion," as quoted by M. de Alauzet.

Boulay Paty, a distinguished modern author, in his *Traité des Assurances*, agrees precisely with Emerigon on this subject, and cites at large the same decisions; showing that in 1827 they still had the force of law in France. 1 Boulay Paty, *Tr. des Assur.* ch. 8, § 14 (ed. 1827).

So in the very recent publication of Alauzet, the same principles are to be found, taken with approbation, and often in the same words, from Emerigon, and the more ancient writers before noticed. 1 Alauzet, *Traité General des Assurances*, No. 152, page 276, &c.

Before the subject of reassurance had attracted much of the attention of the courts in England, it had in practice become a mode of gambling to such an extent that parliament interfered; and by the act to regulate insurances, 19 Geo. 2, ch. 37, prohibited reinsurances, except in a few instances of rare occurrence, as when the assurer should be insolvent, become bank-

rupt, or die. § 4. Hence we are without the aid of judicial authority on this question in the English courts. The treatises however fully coincide with the French writers.

Thus, Mr. Justice Park says, that the object of reassurance is to throw the risks of an insurer upon other underwriters, and cites Roccus to show that the reassured pays the whole loss which the original insurer incurs. He says, this species of contract has obtained a place in most of the commercial systems of the trading powers of Europe; and after stating its principles and rules, he adds, that the law of England has adopted the same regulations. 2 Park on Ins. 595, 596, ch. 15 (ed. of 1842, by Hildyard). Marshall on Insurance is to the same effect. He says, the new insurers will be responsible to the first insurer, in case of loss, to the amount of the reinsurance. 1 Marsh. 143.

The same principle is maintained in this country; 2 Phillips on Ins. 58, 749, ch. 14, § 2, and ch. 28, § 15, where it is stated in positive terms; and 3 Kent's Comm. 279, where it is a necessary consequence of the author's positions.

Throughout the modern treatises in all languages reassurance is distinguished from double insurance, which is a contract entirely different, and is treated in connection with the former, and its peculiar traits pointed out. We will presently revert to double assurance, in speaking of the usage claimed by the defendants. Most of the authors to whom we have referred treat of marine insurance, and this is a fire policy; but no difference is claimed to exist between the two species of insurance in this particular.

The illustrations of the principle in the courts of justice sustain the treatises on reinsurance. We have already referred to the two French decisions reported by Emerigon, and cited by the other French authors. In *Hastie v. De Peyster*, 3 Caines, 190, it was decided that the first insurer should recover against his reassurer the whole sum for which the former was liable, including the costs of the suit against him, the reassurer having been notified to defend the same. Chief Justice Kent, in delivering the opinion of the court, cites Emerigon and Pothier, and says, that the reassurer will be obliged to pay all that the first insurer ought himself to pay; and that the reas-

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suror is bound to indemnify his own insured, when the latter can show he has been damnified in consequence of the first insurance. Livingston, Justice, cited, with approbation, the passage from Roccus, to which we have referred, to the effect that the reassurer pays the whole loss which the first insurer incurs.

The case of *Merry v. Prince*, 2 Mass. 176, sustains the same view of the reassurer's liability. Indeed, the argument on both sides, and the judgment of the court, alike proceeded on the assumption that the first insurer was entitled to a complete indemnity.

In *The New York Bowery Ins. Co. v. The New York Fire Ins. Co.* 17 Wend. 359, the subject of reinsurance was again presented to the supreme court of this state, and its legality questioned. The court decided that it was a valid contract, and discussed and treated it throughout as a contract for the indemnity of the first insurer.

In *The New York State Marine Ins. Co. v. The Protection Ins. Co.* 1 Story's R. 458, the only question brought before the court was that of the reassurer's liability to pay the costs and expenses which the first insurers incurred, and were compelled to pay, in a suit against them by the primitive insured; notice of the suit having been given to the reassurers as soon as it was commenced. Judge Story decided that they were bound to pay the whole of such expenses. He held that the reinsured, on the happening of a loss, might pay his insured at once, at the peril of being obliged to prove his liability in an action against his reassurer; or he might await a suit against himself, and give notice of it to the reassurer. In that event, the reassurer should immediately pay the loss and avoid the litigation, or if he suffered the suit to proceed against the reassured, he would be subjected to all its expenses, if it proved that the latter was liable for the claim. Judge Story says, in his opinion: "It seems to me, that upon the principles of the common law, under like circumstances, the party reassured is entitled to recover a full indemnity for the entire loss sustained by him, and also for the costs and expenses which he has reasonably and necessarily incurred, in order to protect himself and entitle him to a recovery over against the reassurers."

These decisions, it is true, do not in express terms declare that a reinsurer is liable to pay the entire loss incurred by the first insurer. Nevertheless, in two of them, the judgment given, as it appears to us, could only have been given on that principle. And in all of them, not only the absence of discussion of the question at the bar, but the direct sanction and illustrations of the courts, are convincing, that the extent of the liability of the reassurer in this respect was too well known and established, to be doubted or disputed.

The usage which the defendants have brought forward is wholly at variance with the uniform doctrine of the books and of the adjudged cases. In the single instance where the underwriter reinsures for the whole amount he has insured, this usage will permit him to be fully indemnified. But if he proposed to himself to continue to incur a portion of the hazard he has assumed, and reinsures for the residue, the usage virtually transforms his contract, as between himself and his reassurer, into a double insurance. We have already adverted to the marked distinction between double insurance and reassurance. In the former, the first insured participates; in the latter, he has no concern. In the former, the underwriters all share in the loss; in the latter, except as modified by this usage, the reassurer pays all that he reinsures, whether it be all or a part of the original insurance. The statement of the defendants' proposition shows that, according to their claim, the first insurer and the reassurer are to bear the loss in the same manner precisely, as if the former had insured \$12,000, and the latter \$10,000, on the same merchandise, in favor of the primitive insured. This, we repeat, is the contract of double insurance, which for two hundred years has been an agreement wholly different from that of reassurance. And we cannot avoid suspecting, that the usage in question has grown up from inadvertently confounding the principles applicable to double insurance which come in play between our insurance companies and their customers, and are of frequent occurrence; with the rules governing reassurance, a contract not so frequent, and in practice made only between the companies themselves.

To return to the admissibility of the usage in question. It

is one of the most embarrassing subjects with which we meet, to determine when and for what purposes evidence of an usage shall be received; and we can add our testimony to that of Judge Story, in the case of *The Schooner Reeside*, 2 Sumner, 567, as to the frequency of the attempts to construe and influence contracts by proof of usage.

We have endeavored, by a careful consideration of the principles of law and the adjudications on the subject, to ascertain the true ground upon which this usage must be admitted or rejected.

We find it clearly settled, that a general usage, the effect of which is to control rules of law, is inadmissible. So of one which contradicts a settled rule of commercial law. In the application of this principle, in one instance, the usage rejected was to the effect, that a bill or note payable to order, and indorsed specially, without adding the words, or order or bearer, ceased to be negotiable. *Edie v. East India Co.* 2 Burr. 1216. In another case, the universal usage in Boston was proved to be, that when a cargo was insured for a voyage out and proceeds home, and the proceeds were not returned, a portion of the premium was refunded to the insured; but the court refused to receive the usage to reduce the recovery on premium notes given upon such an insurance. *Homer v. Dorr*, 10 Mass. 26.

In *Frith v. Barker*, 2 Johns. 327, a master of a ship claimed to recover freight on fifty hogsheads of sugar, from which, owing to the leakage of the vessel, the sugar washed out during the voyage, and the casks were empty on their arrival in this port. The master offered to prove that, by the usage of merchants at New York, freight was payable for the empty casks under such circumstances; and the court held it was not competent.

On the other hand, there is a great variety of cases in which the courts have permitted evidence to be given, to show the meaning of terms in commerce and the arts, or of words and phrases peculiar to mercantile pursuits. This is generally spoken of as proof of usage; although in many cases it is rather the definition of technical language. Thus, without citing the cases at large, we will refer to the following instances,

as illustrating the principle upon which they proceed. "Roots," were proved not to include sarsaparilla, in the clause relative to average in a marine policy, the insurance being on sarsaparilla; the term "skins," in a like instance, does not include bear-skins having the fur on them; the word "outfits," in policies on whaling vessels, includes one fourth of the catchings; the catchings becoming virtually the proceeds of a large portion of the outfits, and the like. So proof has been allowed of the meaning of the term "sea letter," in policies at a particular port; the meaning of the word "cargo," in particular voyages and lines of trade; the customs of a particular trade in respect of convoy, the mode of unloading goods at the port of destination, the period of detention allowable at intermediate ports for landing parts of a cargo, the meaning of "proceeds of goods shipped," and the like.

But when an attempt was made to prove that by the usage, a boat lost from the stern davits was not to be paid for under a policy on a ship, her tackle, &c., or that a boat slung upon the quarter was not covered by such a policy, the supreme court of Massachusetts, and the court of exchequer in England, in contemporary decisions, rejected the evidence.

In *Rankin v. The American Insurance Company*, 1 Hall's R. 619, the defendants offered to prove, in bar of a recovery on a policy on merchandise, that by the usage of trade in this port, it was indispensable to charge the indemnifiers for goods imported, that an actual survey should be made on board by the port-wardens, finding that the goods were properly stowed and were damaged on the voyage, by the perils of the sea. This court held that the evidence was inadmissible. And see *Turner v. Burrows*, 5 Wend. 541, affirmed in error, 8 lb. 144.

In fine, we believe that the rule of construction applicable to policies of insurance does not differ from that applied to other mercantile instruments. Its sense and meaning are to be ascertained from the terms of the policy, taken in their plain and ordinary signification; unless such terms have, by the known usage of trade in respect to the subject matter, acquired a meaning distinct from the popular sense of the same terms, or unless the instrument itself, taken together, shows that they were understood in some peculiar manner. And that while we

may not enlarge or restrict the clear and explicit language of the contract, by proof of a custom or usage; yet, in the application of the contract to its subject matter, in bringing it to bear upon any particular object, the customs and usages of trade are admissible to ascertain what subjects were within, and what were excluded from its operation. Such evidence is proper, on the same principle that proof of the meaning of technical words, and words of science and the arts, is permitted in arriving at the intention of the parties in the construction of contracts.

In this instance, the word "reinsure" has a definite meaning, settled in the law for two centuries past, and having the same meaning in its ordinary and popular sense. It is equally effective with the word "insure," and it has been decided that "insure" may be used in a policy of reinsurance, with the same force and validity. The proof offered attempts to wrest the term "reinsure" from this established sense, and make it correlative, as between the first insurer and the reassurer, wherever the former insures more than the latter, with the distinct and different contract of double insurance. In our view, it seeks to vary an express agreement between these parties, couched in plain language, having an established legal, as well as conventional meaning; and we are entirely clear that the testimony of the usage ought not to be received.

Without fully concurring in the very strong and pointed language of the late Judge Story, against the indiscriminate resort to testimony of usages and customs of trade, to control the construction and the results of contracts, 2 Sumner, 567; 1 Story's R. 608; we are free to say, that we agree with him in a desire to restrict them to more exact and better defined limits. And we shall be inclined to adopt his caution and reluctance in their admission, as we regard the resort to them as liable to dangerous abuses in the interpretation of agreements.

We feel the less hesitation in coming to the conclusion that the usage in question is not admissible (in which we are compelled to differ from the opinions of many gentlemen of great distinction and ripe experience in the business of insurance); because the whole subject of reinsurance in this city is confined to the narrow circle of the chartered insurance companies,

and a prompt and effectual remedy against loss from a reliance upon the usage is open to them in the cancellation of existing policies, and an express stipulation in those hereafter made.

Second. The remaining question in the cause arises upon the defendants' objection, that the plaintiffs were bound to pay the loss before they could maintain a suit, and that in no event can they recover more than the assets of the American Mutual Insurance Company will pay to the primitive insured.

The latter proposition is surely unsound. The fact that the insurers were a corporation does not affect the point. Their claim upon the reassurers rests upon their liability to pay the loss to the insured, not on their greater or less ability to pay it in full. If the liability of the reassurer depends upon the solvency or bankruptcy of the first insurer, in many cases he will not become chargeable at all, or but to a nominal amount, according to the extent of the first insurer's insolvency.

As to the other branch of the objection. It is true, the contract is one of indemnity. That is, the insurer is to be protected by the reassurer, to the extent of his loss. But when the loss is incurred, the reassurer, by the positive terms of the contract, is to pay the amount to the insurer within sixty days after the same is ascertained and proved. The reassurer has nothing to do with the payment by the insurer. In the French policies, both to relieve the insurer from the trouble of going through all the proofs on a trial, and to save costs to the reassurer, it has become customary to insert a provision, that the reassurer shall pay, on proof of payment by the insurer. And it is to this provision that M. de Alauzet refers in his treatise cited by the defendants. But in France, where there is no such clause; and uniformly here, where it is as yet unknown; the insurer may at once resort to his action against the reassurer; taking upon himself the burden of making out his claim with the same precision that the first insured would be required to do, in an action against him; or he may await a suit by the first insured, give notice of it to his reassurer, and on being subjected to the loss, recover it, with the costs of the litigation, against the latter. There is no authority for saying that he must pay the loss in the one instance, or the judgment against him in the other, before enforcing his demand against the re-

assurer. In *Hastie v. De Peyster*, cited to this point by the defendants, the insurer had stood out a suit against him by the first insured, and it is inferrible from the points raised, that he had paid the recovery; but no such fact is stated, it is not discussed by the counsel, and the language of Chief Justice Kent, as well as Judge Livingston's, is unequivocal, that he may recover, not what he has paid, but all that he ought to pay, or has become liable to pay.

The decisions in France, cited by Emerigon and Boulay Paty, fully sustain the principles laid down by those distinguished authors, which we have already noticed incidentally in speaking of the extent of the reassurer's liability. In one case, adjudged in 1748, the reassured became bankrupt, and was discharged, having paid the first insured sixty per cent. of the loss. Nevertheless, the reassurer, who thought he ought to pay only the same sixty per cent., was condemned to pay the bankrupt the entire sum reassured.

The other case was in 1780, in which the first insured claimed they ought to receive the amount of the loss from the reassurer, instead of permitting it to go into the hands of the assignees of the insurer, who had become bankrupt. The claim of the first insured was overruled, and the reassurers required to pay the whole sum to the assignees.

Alauzet concurs with Emerigon, and cites a similar judgment in the court of Rennes.

So in Marshall it is laid down, that if the original insurer fail, so that his insured receive only a dividend, however small, the reinsurer can gain nothing by this, but must pay the full amount of the loss to the first insurer. And thus, he adds, stands the law in most of the maritime states of Europe. 1 Marsh. on Ins. 143.

To the same effect is Park on Insurance, and 3 Kent's Commentaries, 278.

The interest and importance of the questions involved have induced us to give our views more at large than is our custom, and nothing remains but to say that we entertain no doubt on the subject, and that the plaintiffs are entitled to judgment for the whole amount of the reinsurance, with interest.

Reassurance. — Insolvency.

This case was affirmed by the court of appeals, *sub nom. Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235 (1849), where the following opinions were delivered: —

GARDNER, J. The structure of the contract upon which this action is brought is exceedingly inartificial. An ordinary policy against loss by fire has, by the substitution of the word "reinsure" for "insure," without any other alteration, been converted into a contract of indemnity against the risk incurred by the mutual insurance company, by a previous insurance of the property of Hackenrath [Herckenrath?] & Van Damme.

The contract in its present form is one of reinsurance. So much appears upon the face of the insurance. The defendants, for the consideration stated, said that they "do reinsure the American Mutual Insurance Company against loss or damage by fire, to the amount of \$10,000, on," &c. The risk, therefore, incurred by the assured in their previous insurance is really the subject of the contract. Against that the defendants agree to indemnify the assured to the amount of \$10,000. The loss which the latter have sustained in consequence of that risk, and which they have paid or are liable to pay, exceeds that sum, and the question is, are the plaintiffs entitled to the whole or a part of the sum mentioned in their policy? The question, when stated, suggests the true answer. For, whatever may be the rule in reference to marine policies, it was admitted by the counsel for the defendants, that the mode of estimating losses under fire policies proceeds upon the principle of a full indemnity, without regard to the question whether the reinsurance was partly or for the entire sum set down in the original policy.

But it was argued that, in this case, the defendants were only liable for such proportion as the sum reinsured bears to the whole amount covered by the first policy, in consequence of a special clause in the contract, which provides, "That in case of any other insurance upon the property hereby insured, the insured shall not, in case of loss or damage, be entitled to

recover on this policy any greater portion of the loss or damage sustained than the amount hereby insured shall bear to the whole amount insured on the same property."

The defence is thus made to depend upon the import of the phrase, "property hereby insured." According to the views of the defendants, it refers to the merchandise stated in the policy to be the property of Hackenrath & Van Damme, the same property that was covered by the original insurance. Hence it is said, that in addition to the sum of \$10,000 reinsured, there was at the time of the loss another insurance on the same property to the extent of \$22,000. If this is the correct exposition of the clause, it follows, 1st. That if the reinsurance had been for the full sum covered by the original policy, the loss must have been equally apportioned between the underwriters upon the two policies respectively. A second consequence of this construction would be, that in no way consistently with the clause in question could the underwriters indemnify themselves against the risk insured, by executing the primitive policy. They could not reinsure to a larger amount than the \$22,000 covered by the first insurance, because that was confessedly the whole extent of their interest in the goods, and by a reinsurance of that amount, in case of total loss, they would be compelled to pay \$22,000, and could receive but \$11,000.

I am aware that the counsel for the defendants claimed that the rule of apportionment upon which they insisted was only applicable to a case of reinsurance for a part of the amount covered by the first policy. If the whole amount was reinsured, it was conceded that the whole might be recovered in the event of a total loss. But the clause which is the only foundation of this claim of apportionment will not admit of this distinction. The language is general and explicit, that "in case of any other insurance upon the property hereby insured, prior or subsequent, no greater portion of the loss shall be recovered than the amount hereby insured bears to the whole amount

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insured in said property." The phrase "property hereby insured," I apprehend, refers to the interest of the insured acquired by them as underwriters upon the original policy, in respect to the merchandise of Hackenrath & Van Damme. The damage to that property by fire was the measure of their liability upon the primitive policy, and of the defendants upon the second within the sum mentioned. That liability did not in strictness give the first insurers a property in the merchandise insured, but only an interest in its preservation. It gave them a claim to the stipulated premium, and was the sole ground of their rights to a reinsurance. It was an insurable interest, the nature of which appeared upon the face of the second policy.

The meaning of reinsurance is, an indemnity against a risk insured by the assured in consequence of a prior insurance upon the same property or some part of it. 3 Kent, 279. We find this word in the policy characterizing the contract, and pointing to the object of the indemnity, together with a reference to the merchandise of Hackenrath & Van Damme, designating the property on account of which the hazard was incurred against which the indemnity was sought.

That the above is the sense in which the parties use the word "property" in the clause in question, is obvious from that which immediately precedes it, which provides, "That in case the *insured* should have already any other insurance against loss by fire on *the property hereby insured*, not notified to the corporation, or if the said insured shall hereafter make any insurance on the *same property*, and shall not give notice thereof to the corporation, and have the same acknowledged by them in writing, the said policy shall be void." What interest or property had the *insured*, which could be the subject of a prior or subsequent insurance? For to them alone this complex prohibition applies. The answer must be, the interest acquired in consequence of the primitive insurance and no other. The object of these provisions was to guard against double insurance; which is a second insurance of the

same interest. *Godin v. London Ins. Co.* 1 Burr. 495; 3 Kent, 281. Both the clauses above quoted relate to the same subject, the interest of the insured; they forbid a double insurance of that interest without due notice to the underwriters, and when it is made and notice given, they provide for a ratable apportionment of the loss. By this construction they can be made to harmonize, and each is rendered sensible.

There is nothing, therefore, in these special provisions, or any of them, that restricts or qualifies the agreement of the defendants, "to make good unto the insured all such loss not exceeding in amount the sum insured," as they might sustain by reason of the original insurance.

The evidence of usage was properly rejected. The offer of the defendants was, to prove the existence of a general usage and custom among underwriters in the city of New York, in cases of reinsurance, not to pay the full amount named in the policy of reinsurance, but only a sum which shall be in the same proportion to the amount of property destroyed, as the policy of reinsurance bears to the original policy. The usage went to contradict the plain unequivocal language of the policy, and was therefore inadmissible. 1 Phil. Ev. 37. The evidence was not offered with a view to ascertain the meaning of particular terms, to explain the subject of the contract; in a word, to place the court, by means of parol evidence, in the situation of the parties, to enable them to construe their agreements; but to show the practical construction as to their legal effect given to all policies for reinsurance without distinction, by underwriters in the city of New York. Such evidence would be equally admissible to diminish a recovery upon any other contract.

We all think it properly overruled, and that the judgment of the supreme court must be affirmed.

CADY, J. If the words, "and in case of any other insurance upon the property hereby insured, whether prior or subsequent to the date of this policy," in the

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policy of reinsurance, include the original policy, then the same words in the original policy must include the policy of reinsurance; and if so, then the first insurer, by procuring a reinsurance, would destroy, in a great degree, the value of the first policy. Suppose a man insures against fire to the amount of \$10,000, and then procures a reinsurance for \$10,000, and then a loss to that amount happens; will not the insured be entitled to recover for the whole loss; or can the insurer say to the insured, I have a policy of reinsurance on the same goods to the amount of ten thousand dollars, and you, therefore, are entitled, according to the terms of your policy, to recover no greater proportion of the loss than the amount in your policy bears to the whole amount insured on the said property? To this, the insured might answer. The meaning of that clause in the policy is, that if I had before, or should, after you insured me, got an insurance on the same property, I should look to each of my insurers for only a proportion of the loss. If that would be the correct construction of the clause in the original policy, the same construction would be given to the same words in the policy of reinsurance; the clause would be without effect, unless the original insurer procured more than one policy of reinsurance. The original policy is a contract made between the insurer and the insured; and it must be understood as relating only to the acts of the parties to the contract, unless express reference is made to the acts of others. So in relation to the policy of reinsurance, when it speaks "of other insurance on the property," it has reference to an insurance to which the insured can resort for a part of his indemnity. The clause was inserted in the policy to restrain the insured, if he had more than one policy, from recovering more than a proportional part of the loss on any one policy; but unless the insured had more than one policy, he must have an indemnity on that, unless the loss be greater than the sum insured.

This construction was given to this clause in the policy by the court for the

correction of errors, in the case of *The Aetna Insurance Company v. Tyler*, 16 Wend. 390. In that case, a Mr. Shafer, the owner of a dwelling-house and out-buildings, procured an insurance on the property from the Merchants' Insurance Company of Albany. While that policy was in force he contracted to sell the property to Tyler, who paid a part of the purchase money, and took possession of the property, and then procured a policy from the Aetna Insurance Company, in which policy was a clause like the one set forth, after which the property was destroyed by fire. The plaintiff in error insisted that Tyler was entitled to receive only such proportion of the loss as the amount insured by them bore to the whole amount insured by them and the other company; but that construction was rejected by the court; and the chancellor, whose opinion is published, held that the clause in the policy related only to double insurance, and that to constitute a double insurance both policies must be upon the same *insurable interest*, either in the name of the owner of that interest, or in the name of some other person for his benefit. In the case under consideration there is no double insurance upon the same *insurable interest*. The American Insurance Company had but one policy on their insurable interest, and upon that they were entitled to a full indemnity, not exceeding the sum insured.

Did the superior court err in rejecting the evidence of the usage among the underwriters in the city of New York, for reinsurers not to pay the full amount named in the policy of reinsurance, but only a sum which should be in the same proportion to the amount of property destroyed as the policy of reinsurance bears to the original policy? The words of the contract in this case are, "The Mutual Safety Company, by this policy of insurance, in consideration of thirty-five dollars to them paid by the insured hereinafter named, the receipt whereof is hereby acknowledged, do reinsure the American Mutual Insurance Company against loss or damage by fire, to the amount of *ten thousand dollars*, on merchandise, hazardous and not hazardous, property of Hack-

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enrath & Van Damme, or held by them in trust," &c. "And the said company do hereby promise and agree to make *good* unto the said insured, their executors, administrators, and assigns, *all* such loss or damages, not exceeding in amount the sum insured, as should happen by fire to the property above specified during," &c.; "the loss or damage to be estimated according to the true and actual cash value of the said property at the time the same shall happen." The construction of a contract in these words has long been adjudged to be a contract of indemnity not exceeding the sum insured. And it is asserted in the fifth point submitted on the part of the plaintiffs in error, that when the reinsurance covers the whole amount insured by the first policy, the first underwriter is entitled to recover of the reinsurer the whole loss, whether partial or total, for which he is himself liable. But it is insisted that in case the sum reinsured be less than the sum mentioned in the original policy, then the reinsurer is not to pay the sum reinsured unless the loss equals the sum mentioned in the original policy. No adjudged case, however, has been referred to, showing the existence of any such distinction. So far as adjudged cases have been referred to, the contract of insurance, or reinsurance against loss by fire, has uniformly been held to be a contract of indemnity not exceeding the sum insured.

The words of the contract in this case are free from any ambiguity. The contract is to make good *all* loss or damage

by fire not exceeding \$15,000. Judging from the words of the contract, it would seem that no two men could differ as to its construction. And for what purpose is the usage insisted on by the plaintiffs in error introduced? To prove that the words *all loss or damage by fire* mean in this case, that the reinsurer will make good only ten out of twenty-two parts of the loss. In the case of *The Schooner Reeside*, 2 Sumn. 567, the bill of lading specified that the goods were "to be delivered in good order and condition, damages of the seas only excepted." And the point was, whether a local usage between New York and Boston (the termini of the voyage) might be admitted to influence the contract so far as to exempt the carriers from liability for all damage, save what arose from their own neglect. Mr. Justice Story excluded the usage, on the ground that, if admitted, it would go, not to interpret or explain, but to vary and contradict the contract. Cowen & Hill's Notes, p. 1411. So in this case, the usage insisted on is to vary and contradict the contract. It is, if admitted, to prove that the word *all* in this case means less than half. There could be no security in a written contract, if a usage in a single city can be given in evidence to vary and contradict it.

The judgment of the superior court ought to be affirmed with costs.

STRONG, J., also delivered an opinion for affirmance on substantially the same grounds. *Judgment affirmed.*

BROUWER, Receiver, vs. APPLEBY.¹

(Superior Court, New York City, December Term, 1847.)

Insolvent Mutual Company. — Organization. — Premium Notes.

Members of a mutual insurance company, when sued by the company upon their premium notes, cannot object to the organization of the corporation.

In an action upon a premium note by a mutual insurance company, the charter of which provided that the company might receive in advance premium notes of persons intend-

¹ 1 Sand. 158.

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ing to insure, and might negotiate such notes for the purpose of paying claims, or otherwise, *held*, no defence that the company had never effected any insurance, and was now in the hands of a receiver; and that the defendant must pay the amount of his note.

Nor is it any defence, except upon the ground of fraud, that influential persons were held out to the defendant as having given similar notes, who had never done so.

Parol evidence of an agreement by the president of a mutual company to give up a premium note at the end of the time it had to run is inadmissible; and a promise made by the president when the note fell due to give it up is also unavailing.

THE case is stated in the opinion.

J. N. Taylor, for the plaintiffs.

J. S. Bosworth & G. Wood, *contra*.

By the Court, OAKLEY, C. J. This is one of a large number of cases pending before us, growing out of the failure of several of the mutual insurance companies.

The actions are brought upon notes given for premiums in advance (or claimed to have been so given), under the provisions of the charters of those companies.

Some of the questions now presented were before us last spring, in the case of *Hone & Bokee, Receivers, &c., of the American Mutual Insurance Company v. Allen & Paxson*, and were decided at the March term.¹ There having been a change in the members of the court since that time, we have examined these questions anew, and after mature consideration, fully concur in the results to which the court then arrived.

In this case, one of the objections made to the plaintiff's recovery is, that by reason of a defect in the organization of the Croton Insurance Company, it never became a body corporate, and never had a right to commence an action on this note. The alleged defect consists in the error in footing up the applications for insurance, by reason of which the company organized and proceeded to transact business, before applications to the extent of half a million of dollars had been made, as is prescribed in the seventh section of the charter.

Two answers were made to this objection. First. It is said that it is only available by a plea in abatement, and there is no such plea. This is met by the argument that the action is not brought by the corporation, and therefore the plea is not necessary nor proper. We think that makes no difference, and probably the want of the plea in abatement is a sufficient answer to the objection. Second. A further answer, however, and

¹ *Post*, p. 597.

one which was held to be conclusive in a former suit of the Croton Insurance Company, is that the company was a body corporate *de facto*, from the time of the passage of the act of incorporation. Laws of 1843, chap. 91, p. 66.

The first section enacts that eleven persons, who are named, "and all other persons who may hereafter associate with them in the manner herein prescribed, shall be a corporation by the name of the Croton Insurance Company." Section two is in these words: "The persons named in the first section of this act are hereby appointed trustees."

By the fourth section, the corporation by that act created was vested with all the powers and privileges, and subjected to all the restrictions, &c., which are reserved, granted, or imposed upon the Atlantic Mutual Insurance Company, by its charter conferred in 1842, with the exception of some powers, not at present material.

The seventh section of that charter (Laws of 1842, chap. 217, p. 261) made it the duty of the trustees to open a book for applications for insurances, and after receiving such applications to be approved by them, amounting to five hundred thousand dollars, the book might be closed and the company might be organized.

Thus this company was fully created a body corporate by the charter, and vested with various powers. The trustees named in this act were to do certain things to organize the institution, but their omission to do them did not affect the rights of the company, or its corporate existence. The defendant, as a contracting party with this corporation, cannot object to the want of the requisite organization, and any defect in that respect, if valid, is only available in behalf of the sovereign power of the state.

The main question in this cause is on the validity of the defendant's premium note.

The twelfth section of the act incorporating the Atlantic Mutual Insurance Company, which is a part of the charter of this company, provides, "that the company, for the better security of its dealers, may receive notes for premiums in advance of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise, in the course of its business; and on such portions of said notes as may exceed the amount of premiums paid by the respective

signers thereof, at the successive periods when the company shall make up its annual statement as hereinafter provided for, and on new notes taken in advance thereafter, a compensation to the signers thereof, at a rate to be determined by the trustees, but not exceeding five per cent. per annum, may be allowed and paid from time to time."

The objects of this section, it is apparent, were to furnish a basis for the business of the company ; a substitute for capital stock, on which those dealing with it might rely for their security.

There is some discrepancy as to dates, but the defendant's note was given under this twelfth section. The fact is broadly admitted ; but no insurances were ever taken by the defendant, and he raises the question whether the note was valid for any amount beyond the premiums on risks assumed by the company, and applicable to the note. The plaintiff contends that the note rests upon a valid consideration, and that he can enforce its payment, irrespective of any insurance being effected under it. This is the opinion of the court, and so it was decided in the case of *Allen & Paxson*.

We place it on the ground generally, that there was an association of the parties giving these notes, to create a fund to be placed in the hands of trustees for the security of creditors of the company, and such parties agreed to contribute their premium notes for this purpose ; and on the faith of this fund the whole business of the company was transacted. From the nature of the act of incorporation ; the objects and purposes of the creation of the fund ; and the mutuality of the contribution thereto, one party giving his note to constitute it, with all others concurring ; we hold now, as was held in *Allen & Paxson's* case, that these premium notes are valid, to the full amount required for the security of dealers with the company ; and the defendant is liable to the whole extent of his note. The case differs from *Allen & Paxson's* on this point, in one particular only. The defendant did not sign with others a preliminary subscription, agreeing to give premium notes under the twelfth section ; but this we deem to be of no consequence. The considerations adverted to are equally strong and sufficient to sustain the note, which maintains the same character as a contribution to the fund under the twelfth section.

There are two other points raised by the defendant. 1. The alleged misrepresentation, by which it is said he was induced to give his note, viz.: that influential persons were held out to him as having given similar notes, who never gave such notes to the company. This is of no avail, unless upon the ground of fraud; and the defence is not placed distinctly upon that footing, nor is any fraud pretended. But if there had been a distinct charge of fraud, there are not sufficient facts to sustain it. The allegation is therefore immaterial.

2. The agreement of the president of the company, when the note was made, to give it up at the end of the twelve months which it had to run; and his promise when it fell due, that it should be given up.

As to the first agreement, independent of the doubt whether the president had any power so to affect the fund held by the company as trustees, the contract alleged is in direct conflict with the plain stipulation in the note itself, and is entirely void. It is a contemporaneous parol agreement, to vary and destroy the terms of the written contract between the parties, and as such is wholly invalid.

The promise after the note fell due is equally unavailing. The president would have had no power to make any such promise, even if this were an ordinary note given for premiums in advance on taking out an open policy, and having no connection with the twelfth section. And it is doubtful whether the board of directors could have made such an agreement without a valuable consideration, for they were trustees of this fund for the security of creditors.

The plaintiff is entitled to judgment for the amount of the note, with interest.

The following is the case referred to in the opinion, *supra* :—

HONE & BOKEE, Receivers, vs. ALLEN & PAXSON.¹

(Superior Court, New York City, March Term, 1847.)

Insolvent Company. — Security Notes.

An action was brought by the receivers of an insolvent insurance company against the makers of a negotiable promissory note, given in pursuance of the twelfth section of the company's charter for the security of dealers. *Held*, that the defendants did not cease to be liable by the fact that the

¹ 1 Sand. 171, note.

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company became insolvent, or by the additional fact that the note was a renewal note, past due when the suit was instituted.

The agreement of the company being to allow five per cent. to the makers of such notes, by way of compensation, this must be allowed up to the time the notes pass into the hands of the receivers.

THE case is stated in the opinion of the court.

D. Lord, for the plaintiffs.

W. Bliss, C. O'Connor & G. Wood, for the defendants.

JONES, C. J., delivered the opinion of the court.

This is an action of assumpsit on a promissory note for \$5,000, made by the defendants, dated December 4, 1844, and payable to the American Mutual Insurance Company, twelve months after date. By the great fire in July, 1845, that company was rendered insolvent, and on the 25th day of November following the plaintiffs were duly appointed receivers of its effects by an order of the court of chancery. Thus the plaintiffs' title arose before the maturity of the note, and before there was any pretence of a right in any one to call for it as *functus officio*. The note remained the property of the company.

This note was given in advance for premiums to be earned by the company, on policies to be taken by the defendants, under the new system of mutual insurance and subscription notes.

It appears that the company was incorporated by an act of the legislature, passed April 1, 1843, and was clothed with various specific powers, besides the usual incidents of a body corporate. Laws of 1843, chap. 75, p. 50.

The seventh section prescribes the mode of organizing the company, on receiving approved applications for insurances to the amount of \$250,000.

The twelfth section is the controlling feature of the act. (This was read by the chief justice, and is the same as that in the charter of the Croton Insurance Company. See *ante*, p. 595.)

Section thirteenth relates to the estimate of profits, for which certificates were to be given to the insurers.

By section seventeenth, annual statements were to be made and published, showing the amount of premiums re-

ceived, the amount of losses paid, the balance remaining with the company, the nature and amount of the securities in which the company's funds were invested, and amount of premium notes and cash on hand. There were further provisions respecting dividends of profits and of accumulations, which it is needless to repeat. Persons insuring in the company were not to be answerable for anything except the payment of their premiums, and the notes given in advance for premiums.

Under this charter the company was organized. Before the organization a subscription was opened and signed by the parties, who thereby agreed to give their notes for premiums in advance, as provided in the charter; thus showing an agreement to give such notes, and that notes were given before the company was organized. The defendants, Allen & Paxson, subscribed this instrument. All the subscriptions amounted to \$250,000. The notes given under it were dated December 4, 1843. Insurances were made during that year. In December, 1844, an arrangement was made under section twelve, by which the first note was given up and a new one substituted, payable one year after date. This was received under the same agreement, and for the same purposes. The subscribers generally gave new notes at the beginning of the second year. During the second year the defendants took out insurances, the premiums on which amounted to \$440, and those were credited on the note, and were paid by the defendants. The company continued its operations until July, 1845. Their losses were then \$350,000; their assets \$230,000, — all the premium notes being included. In November, 1845, on the plaintiffs being appointed receivers, all the funds of the company were handed over to them.

The defence is, that the note was given for premiums in advance, and was to be negotiated by the company to raise money

Insolvent Company. — Security Notes.

for prompt payment of claims on the company in case of a temporary exigency. That the defendants had made no insurances to fill the note, and the company had not negotiated it, and so the note was without consideration and could not be enforced.

The plaintiffs contend that these notes were given for the better security of dealers, and as a fund, in case of necessity, to meet losses which the company might sustain. Neither party claims to use them as stock, or otherwise than as a fund for the better security of dealers, in case of the insufficiency of the other funds of the company. It is clear that the notes were entitled to no dividends, nor to votes for directors, until insurances were effected by the makers, but they did entitle the makers to take insurances on the usual terms, and then they became corporators. For the excess of notes, over the premiums on insurances taken, they continued their original liability. For this portion of the notes a compensation for their credit was allowed.

What, then, was the liability? It must be decided by the twelfth section and the general purposes of the company.

The twelfth section does not require the company to take such notes, but authorizes them to take the notes. It is not a prerequisite to their organization or transacting business. The seventh section regulates the organization. Applications for insurance were to be made to the amount of \$250,000, and it is authorized organizing as soon as applications for that amount of insurance were made and approved. At the average rate of premiums, the amount payable for insurances to the amount of \$250,000 would be \$7,000, on which they might begin business. It was attempted, by an historical review of these mutual companies, to show an authority to commence business without any capital, and so that there was no implication for capital in this charter.

The company purports to be a mutual insurance company. Originally, mutual insurance was where all the insurers agreed to apportion all the losses among

themselves ratably. That was a very safe mode of insurance, but not applicable to marine policies. It was not originally applied, nor was it easily applicable to marine risks. It was not so applied for a long time. The old mutual plan, and the mode of ratable contribution by the insurers themselves, was always safe, but never could be profitable. The legislature has since introduced modifications of the plan. First, obliging individuals insuring to give notes for a percentage sufficient to pay losses. These notes formed the capital, as it were, of the company. This system underwent various modifications, until finally the mode now in question was introduced. Notes were dispensed with to rely on premiums only, or on insurances agreed for, as soon as the company was ready to make them. In this respect the parties were left much to fix their own standard, for when premiums are properly rated the business is safe. Besides, the dealers become corporators, and so they let the company go into effect, and they are to act on it accordingly. These considerations, doubtless, had their weight. But obviously, both the legislature and the dealers sought to enable the corporators to acquire and create a fund to operate as a further security, and hence was inserted a power under the twelfth section to take notes for premiums in advance, to constitute a further security for dealers; and to encourage the giving of such notes, the makers were not only allowed the benefit of the company by insuring, but a percentage for the use of their credit.

The present company organized upon applications which would give \$7,500 of premiums at three per cent. Before they entered on business, however, they raised this \$250,000 of notes for premiums in advance. Could this company hope for business to the amount necessary to make profits on a fund of \$7,500? The events of the first year might bankrupt it at once. They could not venture on any such chance. They agreed to obtain a larger amount by subscription notes to \$200,000, and, in fact, they raised it to \$250,000. With this collateral security

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they began. They were at first successful, and continued so until the great fire.

Why are not the provisions of the twelfth section broad enough to sustain the plaintiffs' claim? Who are the dealers intended? They are the insured, claiming for losses sustained. Are not these sufferers entitled to look to these funds provided for their better security? Can anything short of that answer the purpose of further security? The makers of these notes had a right to use them for premiums. But many would have no occasion thus to use the notes. To provide for the use of their credit, they were entitled to compensation at the rate of five per cent., a liberal allowance for a risk so unlikely to result in loss. It is conceded that the company might negotiate these notes to pay claims arising in the course of their business, but it is denied that they can be applied to policies issued in the course of business, when losses thereon have rendered the company insolvent. The idea that the five per cent. was for the mere exposure of the parties to advance to a solvent company, and they to be free from any liability if the company became insolvent, is unreasonable. It is only when the company fails that a further security is necessary for the security of the dealers. Insurance at adequate premiums is a safe pursuit. If so safe as to meet no loss, the allowance of five per cent. for only a temporary advance to a solvent company, and which is not applicable to the same company when insolvent, could never have been the intent of the legislature. This would be a safe and lucrative business for the makers of the notes, when liable, as the plaintiffs contend they were, and many entered into it who had no occasion for premiums. This was rather an abuse, for these notes were intended to be given by those who should take insurances. But when notes were offered, the company could not determine that they would not be so used for premiums, and they therefore must all stand on the same ground.

It is said that the power to negotiate these notes excludes all other powers, and

that no power can be implied; that the important purpose of security for dealers is satisfied by the power to raise funds upon them by negotiating for promptitude merely in paying losses. And this is contended in respect to a company in possession of premium notes sufficient to pay the losses.

This argument does not satisfy my mind. Why is not the note an effectual security for the losses? It is argued, that "better security" expressed only the reason or motives of the legislature, and is not an expression of the extent to which these notes might go. But why limit their use to one single benefit? Is this one a sufficient subject to restrain the limitation to the effect claimed? The cases on the construction of statutes do not sanction such a limitation. The obvious meaning of "further security," to a common understanding, calls for a larger construction than that of a mere advance in a case of solvency.

The consequence is, that if these notes are negotiated, the amount of premiums for insurances undertaken is to be credited; and so far as the notes remain unpaid, they pass to the receivers for the benefit of those claiming losses. If, on satisfaction of all claims against the company, there is a surplus, the makers of the notes will stand as creditors, to be satisfied out of such surplus.

It is said that the terms of section twelve limit the purposes for which the note may be used, to the right to negotiate it while it is a living note; that it is only to be regarded before maturity as a species of accommodation note, to meet claims in the regular continuation of business; and the moment the company ceases, the notes are not negotiable. If so, when it becomes insolvent, the company must return all the notes. The makers may receive their percentage until the risk arises, and then the notes are to be delivered back. In all the statements of the companies, these notes are invariably given. True, the mode of keeping the books does not make a rule, but it is a contemporaneous exposition.

As to the evidence offered, that the pres-

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ident of the company agreed the notes should be returned; the president had no right to make any such agreement. The question is, what was the construction of the twelfth section, and the nature of the notes?

It is said, the note is only available while current. The twelfth section goes on the idea that the notes are to continue as long as the company endures. But it is said, the statute only contemplates that they are to be held while negotiable. Their being overdue, only lets in any inquiry as to the circumstances under which they were given. Negotiability, is transferability so as to permit a suit in the name of him to whom the note is transferred. The notes not only are negotiable during currency, but are equally so to pay a loss, at any time after they are due; and a transfer by act of law, or to general assignees, is as effectual a negotiability, as a discount before due.

It is said they are to be used for the purposes of the company. True, but is not payment of losses, on policies contracted in the course of business, the purposes of the company?

It is too narrow to limit the effect of the notes, to the benefit of those who were

to get their five per cent. as against the dealer meeting the loss.

The agreement being to allow five per cent. to the makers of these notes, it must be allowed up to the time the notes went into the hands of the receivers, and the defendants are entitled to be credited for the premiums where insurances were made, and the premiums have not been credited on the notes.

OAKLEY, J., concurred. He said that if there were no other reasons, the notes were valid from the association of those who should become, or expected to become, dealers, to form in a certain sense capital for the company, a fund to meet losses, by means of these notes. Otherwise, some one note might be negotiated while the company continued business, and the maker be made liable, while upon its insolvency, all the others would be clear. This never could have been intended.

The consideration for the note, in this view, was the mutual agreement to give each other's notes to the company for premiums in advance, under the twelfth section.

I never could, from the outset, see any room to doubt the liabilities of the parties.

Judgment for plaintiffs.

HONE & BOKEE, Receivers, vs. FOLGER *et al.*¹

(Superior Court, New York City, December Term, 1847.)

Insolvent Company. — Security Note renewed.

Renewal notes given for the security of dealers stand upon the same footing as the notes given at the organization of the company, and are supported by the same consideration.

It is no defence to an action upon such a renewal note that the defendants made an application for insurance with the company after the failure, for the sake of reducing their note, and that the company refused to insure.

D. Lord, for the plaintiffs.

J. W. Hamersley & C. O'Connor, contra.

By the Court, OAKLEY, C. J. This case differs from *Brouwer v. Appleby*, in respect of the note in question, in only one circumstance. The note was given in renewal of the premium note first given, under the twelfth section, at the time the latter fell due, and for the same amount.

The court decided in *Allen & Paxson's* case [*supra*], that the renewed notes stood upon the same footing as the notes given at the organization of the company, and were sustained by the same consideration.

Another point was made in this case, founded upon an application for insurance, made by the defendants to the company, in respect of their note, after the company failed and discontinued business,

¹ Sand. 177.

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and upon the refusal of the company to fancy, a mere pretence, which needs no insure. This, we think, is altogether a consideration. *Judgment for plaintiffs.*

HONE & BOKKE, Receivers, vs. BALLIN & SANDER.¹

(Superior Court, New York City, December Term, 1847.)

Insolvent Company. — Renewal Security Note. — Deduction.

If upon the maturity of a note given for the security of dealers, the maker gives a renewal note for the same amount, not deducting the amount of premiums earned during the time in which the first note was current, he will not be allowed to deduct the amount afterwards in a suit upon the second note by the company's receivers in insolvency.

D. Lord, for the plaintiffs.

W. M. Everts, for the defendants.

By the Court, VANDERPOEL, J. The difference between this case and *Brouwer v. Appleby* is this: The defendants at the organization of the company gave their note for premiums, under the twelfth section, for \$1,000, at twelve months; during which time they took out insurances upon which the premiums earned amounted to \$518.29. At the end of the year they paid this sum, and, instead of deducting it from the \$1,000, and giving a renewal note for the balance, they renewed their premium note for the whole amount, \$1,000. During the second year their premiums earned were \$514.41, which they may deduct from the note, on paying the same. But they now claim to go back of the renewed note, and to have

the same benefit from the \$518.29 taken out in premiums while the original note was running. We think this cannot be done. They had an undoubted right, when that note matured, to deduct the amount of those premiums, and to give a new note for the balance only, or pay such balance. But their act in renewing the note in full cannot be regarded otherwise than as a determination to have the benefit of a continuing subscription note under the twelfth section for that amount, with its anticipated benefits of the five per cent. compensation, and the extended credit for premiums which they might incur. It therefore is in the same position as if it were a note for \$1,000, then given under the twelfth section for the first time, and is valid for the whole sum.

Judgment for plaintiff.

THE MERCHANTS' MUTUAL INSURANCE COMPANY vs. LEEDS.²

(Superior Court, New York City, December Term, 1847.)

Insolvent Company. — Premium Notes. — Security of Dealers.

The maker of a note given as a security for dealers with the company, is entitled to have deducted therefrom the amount of premiums which the insolvent company has debited to him, upon paying the same.

ACTION on a promissory note for \$687.95, given under the twelfth section of the company's charter, for the security of dealers. The defendant became indebted to the company in the sum of \$187 premiums, for insurances with them; and this sum was tendered after the present suit was begun.

J. G. Ferguson & D. Lord, for the plaintiffs.

C. O'Connor, for the defendants.

By the Court, SANDFORD, J. This case does not differ in principle from those in which my brethren have announced our conclusions. One circumstance may be noted which is common to several of

¹ 1 Sand. 181.

² 1 Sand. 183.

Insolvent Company. — Premium Notes.

the cases. After the note in suit was given, the defendant took out insurance with the company for the premiums on which he stood a debtor on their books when the company failed. On paying such premiums, he is entitled to have the same

amount deducted from the premium note in suit, and the recovery will be for the balance of such note. The judge so charged the jury at the trial.

New trial denied.

THE MERCHANTS' MUTUAL INSURANCE COMPANY vs. REY.
SAME vs. DE PUGA.¹

(Superior Court, New York City, December Term, 1847.)

Insolvent Company. — Premium Notes.

When premium notes are taken subsequently to the organization of the company, it is a question of fact, to be determined by the character of the note and the evidence, whether it was given as a subscription note, to form part of the fund for the security of dealers, or was given for premiums in advance, in the usual course of business.

ACTIONS upon promissory notes. The cases are sufficiently stated in the opinions.

J. G. Ferguson, & D. Lord, for plaintiffs in both suits.

C. W. Sandford, for Rey.

J. N. Taylor, for De Puga.

OAKLEY, C. J., delivered the opinion of the court, in the suit against Rey, as follows:—

Only one witness was examined in this case, and his testimony was rather equivocal on the point whether the defendant's note was given under the twelfth section or not. The judge at the trial laid down the rule to the jury, in his first proposition, that the twelfth section of the charter only referred to notes given on the original organization of the company, and to notes in continuation and renewal thereof; and that such notes were valid. In this form the charge was not sound. It is true, that it was somewhat qualified by the second and third propositions. The second was, that as to other notes taken by the company in advance from premiums on insurances to be applied for, such notes were not valid beyond the amount of premiums on insurances applicable thereto; and the third, that unless it should appear that the maker of the

note gave it, intending it as a security for dealers, in which event he would be bound although premiums were not earned applicable thereto. The three taken together may be unexceptionable, but it is quite possible the jury were misled by the one fact stated; and we deem it advisable to have the question again submitted to a jury.

Where premium notes are taken subsequent to the organization of the company, it is a matter of fact, to be determined by the character of the note and the evidence, whether it was given as a subscription note under the twelfth section, to form a part of the fund for the security of dealers, or was given for premiums in advance in the usual course of the business of the company.

If it appear to have been given under the twelfth section, it is just as valid and binding upon the maker, as if it had been given on the organization of the company.

New trial granted.

VANDERPOEL, J., delivered the opinion of the court in the suit against De Puga, as follows:—

The note in question was claimed to be a premium note given under the twelfth section. The facts were briefly, that the

¹ 1 Sand. 184.

Insolvent Company. — Reinsurance.

defendant on the organization of the company, gave a note under that section, and during the year it run, consumed over two thirds of it in premiums. At the end of the year he gave a new note for the balance. Two months subsequently, he gave this note for \$500, at the same time taking out an open marine policy, the premiums and charges on which, if all written, would be \$376.50. The renewed

note before mentioned was consumed in premiums while it was maturing. The secretary of the company testified that the note in suit was not given under the twelfth section, but was an ordinary premium note given on taking an open policy. This was a question of fact, which was properly disposed of at the trial, and the verdict of the jury is entirely satisfactory. *New trial denied.*

HERCKENRATH & VAN DAMME vs. THE AMERICAN MUTUAL INSURANCE COMPANY.¹

(Court of Chancery, New York, February 21, 1848.)

Insolvent Company. — Reinsurance.

A party insured in a company which reinsures his risk in another office does not, in case of the insolvency of the former, upon a loss, acquire a lien as against the latter upon the amount due on the contract of reinsurance. Such reinsurance fund goes to the creditors generally of the insolvent company.

Semble, That the reinsurer in such case is bound to pay the full amount that the original insurer was liable to pay, and not merely the amount he did pay.

MOTION to dissolve an injunction restraining the American Mutual Insurance Company from receiving the amount due on a policy of reinsurance from the Mutual Safety Insurance Company, and restraining the latter from paying the same.

The complainants had insured to a large amount in the first named company, which, after reinsuring the risk in the other company, had been rendered insolvent. The complainants contend that they had a lien, upon a loss of the property insured, on the fund of reinsurance due from the Mutual Safety Insurance Company to the defendants on the contract of reinsurance.

E. Sanford, for the complainants.

B. D. Silliman, for the American Mutual Insurance Company.

THE CHANCELLOR. The question in this case is one of considerable importance. But as the contract of reassurance was virtually prohibited in England more than one hundred years since, and before the principles of the law of insurance had been well settled there, nothing is found in the English reports upon this point. And, so far as I have been able to dis-

cover, the question has not heretofore arisen before any of the courts of this country for decision. The validity of the contract of reassurance was early acknowledged among the maritime nations of Europe; being found in the Guidon, and also in the marine ordinances of Louis the Fourteenth. *Le Guid. ch. 2, art. 19; Ord. of 1681, tit. Assur. art. 20.* It is expressly authorized by the present commercial codes of France and of Spain. *French Com. Code, art. 342. Com. Code of Spain, art. 852.* It is also recognized by our courts as a valid contract here. *Hastie & Patrick v. De Peyster & Charlton*, 3 Caines, 190. *Bowery Fire Insurance Company v. New York Fire Insurance Company*, 17 Wend. 359. And I believe it is a species of insurance which is in common use in many of the other states of the Union, as well as with us. I have, therefore, considered it proper to examine the question raised by the bill in this case with considerable care, and to arrive at a correct conclusion thereon.

² Valin, if he has not confounded a reinsurance of the first insurer, against the risk he has assumed, with what is said in

¹ 3 Barb. Ch. 63.

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the twentieth article of the Guidon as to a reinsurance obtained by the person originally insured, against the insolvency of his first insurer, decides the question in favor of the claim of the complainant in this suit. For in his commentary upon the twentieth article of the ordinance of 1681, relative to insurance, he says, the insurer procures a reinsurance, remains subject to the same obligation to the person previously insured by him, while he causes his own *solvency* to be insured. That the effect of it is, that the person insured has two insurances instead of one, with a perfect right of action directly, and *in solido*, against each of them; so that he is not obliged to proceed against the first insurer before attacking the second, provided the engagement *in solido* has been stipulated in the policy of reinsurance, otherwise a discussion will be necessary. 2 Becane's Valin, b. 3, tit. 6, art. 20, p. 278. Emerigon, however, is of an entirely different opinion. He says, the risk which the first insurer has assumed forms, as between him and the reinsurer, the subject matter of the reinsurance; which is a new contract, entirely distinct from the first, which still subsists in all its force. For that reason, the premium of reinsurance may be greater, or it may be less, than that upon the first insurance. If the premium is less, it is a gain which the first insurer makes; if it is more, it is his loss. It is no concern of the person first insured, who is not brought within this new contract. And to sustain this position, Emerigon refers to Pothier. He says, it follows from this principle that the person first insured cannot sustain a suit upon the reinsurance. To support this principle, he cites two decisions of the French commercial courts, in which it was expressly decided that the person originally insured was not entitled to the benefit of the reinsurance in case of the failure of his insurer. The first was decided in 1763; where the first insurer, after having procured himself to be reinsured, became a bankrupt. The subject matter of the first insurance having been lost by the perils insured against, the persons who were originally insured claimed a lien or a right

to a preference in payment, to the extent of their loss, out of the fund produced by the reinsurance. This claim was contested by the general creditors of the bankrupt; and the court rejected the claim of preference made by the persons insured by him. The second case, which arose fifteen or twenty years afterwards, was substantially the same in all its circumstances, and was decided in the same way. 1 Emer. Traité des Assur. ch. 8, § 14. And to show that the reinsurance is not a contract for the benefit of the person first assured, and merely to indemnify the insurer for what he actually pays upon his own insurance, in case of loss, Emerigon cites a decision by the commercial court at Marseilles, in 1748. There the original insurer failed, and by the compromise with the assured and his other creditors, the insurer only paid sixty per cent. upon the amount of his debts. The reinsurer thereupon claimed the benefit of a deduction to that extent, upon the policy underwritten by him. But the court held that the reinsurer was bound to pay what the original insurer became liable to pay, to the first assured, in consequence of the loss of the subject matter of the first insurance; and not what he had actually paid, upon the compromise with his creditors, as an insolvent debtor. And judgment was accordingly given against the reinsurer for the whole amount of the reinsurance.

Delvincourt, a very recent French writer, in his Institutes of Commercial Law, after stating the opinions of Valin and of Emerigon upon the questions now under consideration, arrives at the conclusion that the opinion of Emerigon is in conformity with the true principles of the contract of reinsurance. And that the reinsurance was, as to the first assured, *res inter alios acta*. 2 Delv. Inst. de Droit Com. 338. Persil, Quenault, and Grun & Joliat, modern French writers on the law of life and fire insurances, as well as Pardessus and Alauzet, also state the law on this subject, as laid down by Emerigon, without objection. Persil des Assur. Terrest. 117, art. 92; Quen. Traité des Assur. Terrest. 29; Grun & Joliat, Assur. Terrest. &c. 189; 1 Alauz. Traité des Assur. 277.

Insolvent Company. — Security Notes. — Consideration.

The law on this subject appears to be understood in the same way in Scotland. For Bell, after stating that the insurer has himself an insurable interest, which he may protect by a reinsurance, says: "This transaction, in the event of the original insurer's insolvency, the person originally insured has no interest in, and cannot recover from the last insurer in any other way than in common with the other creditors of the first insurer." 2 Bell's Law Dict. 93, art. Insurance. Millar says a reinsurance is a hedging contract, by which the underwriter withdraws himself from all risk; and that an insurance against insolvency is a contrivance by which the assured strengthens his former security. Millar on Ins. 233. And Marshall understands the law in England, on this subject, to be the same that it is stated by Emerigon to be in France; although

he refers to no English decisions. 1 Condry's Marsh. 143. Judge Livingston also, in the case of *Hastie v. De Peyster*, says there is no privity at all between the person originally insured and the reinsurer. 3 Caines' Rep. 196.

The weight of authority, therefore, is decidedly against Valin upon this question. And from the nature of the contract of reinsurance, and the want of privity between the reinsurer and the person first insured, I think it does not come within the rule, that the principal creditor is, in equity, entitled to the benefit of all counter bonds and collateral securities given by the principal debtor to his surety.

The claim of the complainants, therefore, cannot be sustained; and the motion of the defendant, the American Mutual Insurance Company, to dissolve the injunction, must be granted with costs.

DERAISMES *et al.* vs. THE MERCHANTS' MUTUAL INSURANCE COMPANY.¹

(Court of Appeals, New York, June Term, 1848.)

Insolvent Company. — Security Notes. — Consideration

Where the charter of a mutual insurance company authorizes such company, "for the better security of its dealers, to receive premium notes in advance, of persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay to the makers of such notes a compensation, not exceeding five per cent. per annum, on so much of the notes as exceeded the premiums on policies actually taken;" *held*, that a note taken by the company in pursuance of its charter for premiums in advance, was valid and effectual for the full face thereof, although the premiums on insurance actually received by the maker amounted to only a part of such note.

It seems, that a note so given is valid by force of the statute authorizing it to be taken, and therefore that a partial failure of consideration cannot be set up to defeat a recovery of the full amount. But if a consideration is necessary, the concurrence of others in giving similar notes for the purpose of giving a credit to the company in pursuance of an agreement entered into by all the makers, the contemplated advantages of insurance in such company, and the compensation authorized to be paid to the makers on such an amount as the notes should exceed the premiums on insurance actually taken, constitute a sufficient consideration to uphold such a note.

THE Merchants' Mutual Insurance Company brought assumpsit in the superior court of the city of New York against Deraismes & Boizard, upon a promissory note made by them, as follows:—

"\$2,785.05. New York, Dec. 4, 1844.

"Twelve months after date we promise to pay the Merchants' Mutual Insurance

Company, or order, for value received, twenty-seven hundred and eighty-five dollars and five cents.

"Deraismes & Boizard."

This note was given in renewal of a previous note for \$3,000, which was given for premiums in advance on policies of insurance, intended to be received by the defendants from the plaintiffs, under the

¹ 1 Comst. 371.

Insolvent Company. — Security Notes. — Consideration.

twelfth section of the act incorporating the plaintiffs; Stat. 1843, p. 73; and in pursuance of the following agreement, which was signed by the defendants and others:—

"The subscribers agree to give their notes at one year from date, to the Merchants' Mutual Insurance Company, of which William Neilson is intended to be the president, for the amounts set opposite to their names respectively, being for premiums on risks to be taken by said company on the following conditions: First, The amount of said risks shall be respectively at least the sum affixed to our signatures, the rates of premiums to be agreed upon hereafter. Secondly, That this agreement shall be entered into by persons satisfactory to each of us, and to the collective amount of two hundred thousand dollars. Thirdly, That the rates charged by the Merchants' Mutual Insurance Company shall be the same as are charged by the insurance companies of this city. Fourthly, That the subscribers shall enjoy the advantage of the Merchants' Mutual Insurance Company, as secured by charter, and shall in no event be made liable for the debts of the company, beyond the amount of their several subscription."

The defendants actually took policies of insurance in the company in pursuance of the above agreement, and of the twelfth section of the charter, to such an amount only as that the premiums thereon amounted to the sum of \$790, and no more. This sum, before the trial of the cause, had been paid to and accepted by the plaintiffs' attorney, together with the costs up to the time of such payment; and it was insisted that the note was not valid or collectable for any further sum, being, as was contended, for all beyond that sum, an engagement to pay premiums on risks which the company never assumed. The company became insolvent in consequence of losses sustained by the great fire in 1845.

The judge who tried the cause in the superior court charged the jury, that as matter of law upon the whole case, the plaintiffs were entitled to recover the full

amount of the note, less the sum of \$790, paid. A verdict and judgment were had accordingly, and the defendants having duly excepted, bring error into this court.

C. O'Connor, for the plaintiffs in error.

D. Lord, for the defendants in error.

GRAY, J. This is an action to recover from the plaintiffs in error a note for \$2,785.05, executed to the Merchants' Mutual Insurance Company, in renewal of a note for \$8,000, given by them to said company, pursuant to the provisions of the twelfth section of the act of incorporation of said company, passed April 10, 1843. See Sess. Laws of 1843, ch. 95, p. 73. The second section of the act provides that after having received approved applications for insurance to the amount of \$500,000, the premiums on which shall have been actually paid in or secured to be paid, the company may be organized and commence its operations. No objection having been made on that ground, we are authorized to infer that all the requirements of the act, preliminary to the due organization of the company, were observed and fully complied with. The twelfth section of the act provides that "the company, for the better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business," and authorizes a compensation, not exceeding five per cent. per annum, to be made to the signers of such notes on such portion thereof as may exceed the amount of premiums actually paid in by the several makers respectively.

The note in question was given for premiums in advance under the twelfth section. The premiums on insurances actually taken amount to \$790, and to that extent the validity of the note is not denied. But the concession that the note is so far valid, it seems to me, virtually admits that it is good for the whole amount. It is not like an ordinary commercial note, where a partial failure of consideration may be set up as between

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the original parties. I look upon this note as a statutory security, the validity of which may be rested entirely upon the statute authorizing it to be taken, and does not at all depend upon any question of consideration. And in this view the security, if good for any amount, is valid and effectual for the whole. If, however, a consideration should be deemed essential to its validity, then the agreement, signed by the plaintiff with others, interested as associates in this company, to give their notes respectively, and to share severally the liabilities, and enjoy the advantages of the Merchants' Mutual Insurance Company, as secured by its charter, and the fact also that dividends of the profits on the excess of the notes so given, over and above the amount of premiums on actual insurance, were also provided for by the charter and to be annually distributed to the several makers of notes, constitute a consideration valid and sufficient to uphold this note.

It was alleged on the part of the plaintiffs below, on the argument, and the fact was not all controverted, that the note in question to its full amount, with the notes of other persons, given in advance for premiums, was, by the commissioners, included with the premium notes on actual applications, and used to make the amount of \$500,000 required by the second section of the act as a prerequisite to the organization and commencement of operations of the company.

It may be questionable, perhaps, whether, under the provisions of the charter, these notes were thus applicable, and whether they could be made legally available on the basis on which alone the organization of the company was authorized by the legislature. But this question was not raised. The objection of the plaintiff in error does not extend to the legality of the company's organization, nor to the collectability of that part of the note amounting to the premium on insurance actually made; but the objection, and the only question submitted for our consideration, is, whether this note, as to the balance beyond the actual insur-

ance, can be collected. Of that I have no doubt. Admitting what I deem is conceded by the plaintiffs in error, that the company was duly organized, and that the note was taken in the exercise of its legitimate powers, and is valid in part and collectable to the amount of \$790, and there remains not a doubt of the validity and collectability of this note to its entire amount, and the application thereof by the company to the purposes authorized by its charter.

It was not the intention of the legislature, nor is it necessary to the validity of these notes to their full amount, that insurance by the company shall, at the time or subsequently, be actually made to the persons making the notes to such an amount as that the premium thereon shall in amount be equal to the amount of the notes. That is not at all important or necessary. The object of this note and all similar notes taken by the company, and the purposes for which they were designed by the legislature, are for the better security of the dealers with the company; and if losses have been or shall at any time be sustained by those dealers, these notes to the entire amount thereof are legally as well as equitably applicable to the payment and liquidation of those losses. By the great fire in New York in 1845, this company incurred liabilities on account of insurances to an extent exceeding altogether its means, and was rendered utterly insolvent; and justice requires, therefore, that all its available means shall be collected and faithfully appropriated to meet the losses of its dealers and creditors. It would be a palpable perversion of the object and design of the legislature, and a gross fraud upon the dealers and creditors of the company, to hold that these notes and securities, upon the basis of which the community has been induced to deal with the company, are void and uncollectable wholly, or available only to the extent of the actual insurance made thereon.

I am of opinion that the judgment of the superior court should be affirmed.

Judgment affirmed.

Insolvent Company. — Security Notes. — Evidence.

BROUWER, Receiver, vs. HILL.
 SAME vs. CROSBY, SAVOYE & Co.¹

(Superior Court, New York City, July Term, 1848.)

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Evidence that other persons besides the defendant, Hill, gave their notes to the insurance company in the same manner, as security for dealers, about the same time that Hill gave his, *held*, admissible to show the purpose for which he gave his own note, in connection with evidence, both that one of the objects of the note was to constitute votes for an ensuing election of trustees of the company, and that he was a trustee at the time.

The published copy of the annual statement was properly admitted in evidence to prove the fact of publication. And whether the defendant, Hill, was cognizant of the existence and contents of the statement, was a question for the jury on the facts proved.

A security note received by the company, payable to the maker's order, is an available security for its face value in the hands of a receiver of the company, though the note be not indorsed by the maker.

A surrender of such a note by the trustees, without consideration, is not binding.

An objection to the organization of the company *held* untenable.

The receiver may sue for torts committed before his appointment.

The verdict of the jury, that the note in question was given as a security for dealers, and not as a premium note, on an open policy on which nothing was ever underwritten, considered, and approved.

An instruction to the jury to the following effect *held* proper: That if the note was given to enable the defendant, Hill, to vote at the ensuing election of trustees, and with an intent and expectation on his part, that it would appear in the annual statement as one of the assets of the company, and would there stand among the securities given for the protection of dealers; and if it did so appear, with the defendant's approbation, or with his subsequent knowledge, without objection, he had no right to withdraw it.

Two actions of trover to recover the value of two promissory notes, the first given by the defendant, Hill, and the second by the defendants, Crosby, Savoye & Co. The notes were payable to the order of the defendants respectively, but not indorsed. At a meeting of the trustees of the company, after the notes had been delivered to them, it was deemed advisable to return them to the makers on the ground that they had not been executed in a proper form, but no formal vote was given to return the notes, nor was any consideration paid by the defendants for the surrender which was then made.

The rest of the facts in the cases appear in the opinion of the court.

D. Lord, for the plaintiff.

F. F. Marbury & E. Sandford, for Hill.

W. Galligan, for Crosby, Savoye & Co.

In the case of Hill the opinion was as follows: —

By the Court, SANDFORD, J. We will first dispose of the points of minor importance presented by the defendant.

1. The testimony that other persons gave their notes in the same manner, and for similar purposes, about the same time that the defendant gave the note in question to the company, is objected to as *res inter alios acta*, and therefore erroneously admitted.

We think the testimony was proper. It is not denied that if the defendant were cognizant of the contemporary execution of this large amount of notes to the company, the fact would be pertinent to the inquiry into the purpose for which he gave his own note on that occasion. And when this question was put to the witness, it was already shown that one of the objects of the note was to constitute votes for the ensuing election of trustees. From this circumstance, and his situation as a trustee of the company, the jury had

¹ 1 Sand. 629.

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a right to infer that he was not ignorant of the unusual transaction to which the question related. It was testimony proper to go to the jury, and was submitted to their consideration and judgment in the charge of the court.

2. The published copy of the annual statement was properly admitted to prove the fact of publication, if for no other purpose. The existence and contents of the annual statement, and its publication, were undoubtedly good evidence against the defendant, if he were cognizant of them at the time. Whether he was or was not, was a question for the jury, on the facts proved, that he was an active trustee; was present at the meeting of the board when the committee was appointed to prepare the statement; and was present at a meeting when the minutes of an intervening meeting were read and approved, in which was entered the committee's reporting, the adoption of the report, and a resolution that it be printed. The statement published pursuant to the statute was as satisfactory evidence of the contents of the annual statement as if the original had been produced. The objection is not, however, made on the non-production of the original.

3. A motion for a nonsuit was made on several grounds. First, that the receiver's rights were no greater than those the company had and could have enforced, if the suit had been brought in its name; and the company could not have enforced the note, even if it were given under the twelfth section, because it could take none but negotiable notes under that section. As to this point, if the note were given as a premium note in advance under the twelfth section, there was no great difficulty in having it made negotiable. If the defendant had refused to indorse it, a court of equity would have compelled him, and thus carried out the intent of the parties by making it conformable to the section. But we do not hold that the section is restricted to negotiable notes. Securities may be negotiated which are not negotiable by delivery or indorsement

merely, and such may be the meaning of this statute. If it were a valid security, though not negotiable, the company could have maintained trover for it against the defendant, or any person obtaining it wrongfully.

4. These considerations are an answer, also, to the objection that the legal title to the note was never in the company for want of an indorsement. If it were delivered to the company as an operative and valid security, the title and the property in it were vested in the company. How such title was to be enforced, or in what form, was quite another matter.

5. That the note was given up by the authority of the board of trustees, and their act cannot be revoked by the receiver. This depends entirely upon the main question, for what was the note given? If it were given for the security of dealers with the company, it is conceded by the defendant, that the trustees had no right to cancel it without consideration, and such is the law undoubtedly. If it were an ordinary business note, the trustees might cancel it; and there was no ruling to the contrary at the trial.

6. That no evidence had been given to show the company was duly organized, pursuant to the seventh section of its charter, or that it ever had a legal existence. This point was decided in *Brouwer v. Appleby*,¹ where it was held to be untenable.

7. Another ground for the motion for a nonsuit was, that the plaintiff, as receiver, cannot maintain trover, or sue for torts committed before his appointment.

This objection is not well founded. The receiver as such, is vested with all the rights of action which the company had when he was appointed, and can enforce them by the same remedies.

The remaining grounds, that there was no evidence that the note was intended as a security for dealers; and that the evidence showed it was given as a premium note, on an open policy, on which nothing was ever underwritten; will be discussed when reviewing the charge to the jury.

¹ *Ante*, p. 593.

Proceeding to the more important points in the case, the first question submitted by the judge to the jury at the trial was, whether or not this note was an open policy note, given by the defendant for premiums, intended to be incurred and earned on the policy which he took out at the date of the note. If it were such a note, the judge instructed the jury to find for the defendant.

Much of the argument before us, on the part of the defendant, was based on the assumption, vigorously and resolutely maintained, that this was such an open policy note; but the jury found that it was not, and we are perfectly satisfied that their conclusion was right. It is true, the secretary says he asked for it as an open policy note, and it was made to assume that color, by the issuing of a policy; but it is impossible to avoid seeing that no such use was intended to be made of that policy. It was not taken or issued for the purpose of writing insurances upon it. The defendant was amply provided in that respect, in the two open policies which he then had running. So far from its being a business transaction on an open policy intended for use, the policy was given up and cancelled more than two months afterwards, when the two others were more nearly filled up, and there was therefore much more occasion for the defendant to take out a new policy for his spring business.

The judge next submitted it to the jury to say, whether the note was given as a premium note in advance for the security of dealers, under the twelfth section of the charter; and upon this it is said there was not a particle of evidence to submit to the jury.

Setting out with the ascertained fact, that the note was not an ordinary open policy note; and that there was a class of notes which could be legitimately given to the company under the twelfth section; what was the case presented to the jury? The defendant, a trustee of the company, charged with the care and protection of its dealers, gave the note in question, with a view to become qualified to vote upon the policy then issued. He knew his note

would figure in the annual statement, as a part of the assets of the company. That this statement was to be published by law, for the public information, and in proportion to the prosperity which it should exhibit, was calculated to induce insurers to take policies in the company. And if he were cognizant that others were giving like notes, he was aware that the assets would be so much the more swelled in apparent amount. If his note, and the others like it, should be included in the statement, among the premium notes on policies issued, it would at least hold out to the world, that the makers of those notes gave them, intending in good faith to exhaust them in insurances to be effected; so that the company, if it did not then possess it, would presently have the benefit of insuring to that amount, and its corresponding profits. If, on the other hand, his note should be included in the item of premium notes for the security of dealers, it would appear as an unqualified asset of the company. As the note was not, in point of fact, given as an open policy note in view of insuring to its amount, the defendant was aware that it could not with truth be inserted as such a note in the annual statement. What then were the jury to find? Should they say that the defendant gave this note, intending to secure himself and his friends, the notes on the policy, and knowing it would be held forth to the dealers with the company and to the community as a business note; when in fact it was a mere sham, a device to procure notes without incurring any obligation or responsibility? Were the jury to find that this trustee was guilty of a deliberate fraud upon his beneficiaries and the public; or were they at liberty to say, that the defendant, desiring to provide notes; not wanting a further policy at that time, but willing for the sake of electing a suitable board of trustees, to incur the responsibility of paying his note; and looking to the compensation provided by the twelfth section, and the privilege of taking out policies in future; determined to deliver his note to the company, in form upon an open policy, in fact as a

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note for the security of dealers, under the twelfth section?

We have no doubt that the jury had a right, upon the evidence, to absolve the defendant from the intention to commit a fraud upon the dealers whom he was chosen to protect, and to refer his conduct in giving this note, to any object or purpose consistent with honesty, and the regular course of the business of the company.

It was urged by the defendant, that there is no proof of his having voted on the policy given at the time this note was made. This is immaterial.⁴ The jury were to consider the object of making the note, and decide upon its character as it was when delivered to the company. In no view could it affect the case, whether the defendant made use of the votes thus acquired, or whether, having obtained them, the anticipated occasion for using them never arose. The existence of the votes and the power to use them, might disarm opposition, as effectually as the use of them might defeat it.

Again it is said that the whole affair was inchoate and executory, resting in proposal merely, with the right purposely retained, of rescinding it by means of declining to indorse the note. In this view, it would be impossible to save the defendant from the charge of fraud; for the policy was delivered and the votes secured. There was nothing inchoate on that side of the transaction. But it suffices to say, that there is no proof that the defendant annexed it as a condition to his giving his note, that he should not indorse it.

It was also said, the defendant's object was simply to give an ordinary open policy note, somewhat in advance of the time he would otherwise have taken a policy, because he was solicited to give it; and that he had not any other object to subserve, although the officers of the company may have expected thereby to secure votes. As to this, the jury have negatived the purpose assigned for the defendant; and we mention it, only to say that it was quite indifferent to the result, whether the defendant desired to secure the votes for

the benefit of himself, or for that of his friends. As he was then a trustee and was reëlected, the proposed benefit seems to have been common to both.

We do not think there was any error in the charge of the judge, in submitting this second proposition to the jury.

There is still another point in the charge, and as the jury may have found their verdict upon it, it becomes necessary to examine it with attention.

As a third question of fact, it was left to the jury to say whether or not the note was given to enable the defendant to vote at the ensuing election of trustees, and with an intent and expectation on his part, that it would appear in the annual statement, as one of the assets of the company, and would there stand among the securities given for the protection of its dealers; and the jury were instructed that if such were the fact, and it did so appear in the statement, with his approbation, or with his subsequent knowledge, and without objection on his part, he had no right afterwards to withdraw it.

There was testimony before the jury upon which they might have found the facts submitted to them in this proposition, and which is sufficient to sustain such a finding. The statement was to be made up and published, before the election was to take place. Hence as a trustee, he knew the note would appear in the statement as an asset, in some form; and as he gave the note intending it to remain till after the election, he necessarily intended that it should appear in the statement. His approbation of its so appearing, may be inferred from the same circumstances. It is proved that he was present at the meeting when the statement was ordered, and that he knew it had been prepared and directed to be published, and he was, as before remarked, bound to know what the law prescribed respecting the contents of such statements. It was a fair inference from all the evidence, that he knew his note was included in the amount of securities set forth in that statement, and he made no objection.

Now, what is the just conclusion of law on such a state of facts? It is contended

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that the note was a nullity, and on these facts there was a fraud committed, and nothing more; that the company participated in the fraud, and therefore it cannot complain; and if any individuals were injured, they must seek redress in some other mode.

We are not satisfied with this reasoning. The officers, and not the insurers and dealers with the company, participated in the fraud, if any there were. It is for the latter and not for the officers of the company, that redress is now sought.

We are disposed to view it aside from the consideration of fraud. The defendant, in this aspect of the case, gave the note, not as an open policy note, but to obtain an open policy for the sole purpose of entitling himself to votes. He was aware and intended that his note should be held out to the dealers and the public, as a valid note, and as one of the assets of the company for the security of its dealers; and it was so held out and published, without objection on his part. He obtained the votes by giving it; the note went to sustain and strengthen the credit of the company, and was placed in a position to aid in inducing dealers to continue their risks, and strangers to enter into new engagements with the company.

We think the law will not permit the defendant, after receiving all the benefit he promised to himself by the operation, to deprive the dealers of the benefit thus held out to them, by withdrawing his note from the company; and that it must be deemed a valid note, for the security of dealers. Whether in this view, the law will refer it to the twelfth section, and thus carry out the consequences which

necessarily flowed from what the defendant did and intended; or will regard it as an accommodation note, lent by the defendant for the security of those insuring with the company; it was equally beyond the control of the defendant and the board of trustees.

A sufficient consideration to sustain the note, may be derived from the advantage to the defendant in securing to himself the right to vote in the policy issued, and from the intended and actual publication of its amount in the annual statement, as one of the assets for the security of dealers.

It was finally insisted, that the plaintiff could recover only nominal damages. If we are right in the foregoing conclusions, the note, although not indorsed, was a valid security, which might have been collected of the defendant, in order to pay losses or claims incurred by the company in its business. Whether the remedy upon it was at law or in equity, its value was the same.

The plaintiff, as receiver, is entitled to the same measure of damages, as if the note had been indorsed by the defendant. *Motion for a new trial denied.*

In the suit against Crosby and others, the points are the same, except that the judge limited his submission of the case to the jury to the two propositions, viz.: whether the note was an ordinary premium note, on an open policy; or whether it was given and received as a note for the security of dealers, and for premiums to be earned by the company. The jury found for the plaintiff, and what we have said in the suit against Hill is decisive of the one against Crosby.

New trial denied.

ASPINWALL *et al.* v. MEYER.¹

Superior Court, New York City, November Term, 1848.)

Insolvent Company. — Security Notes. — Transfer.

A premium note being taken in advance, under the company's charter, for the better security of dealers, and the company being authorized to negotiate such notes for the purpose of paying claims in

¹ 2 Sand. 180.

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the course of its business, *held*, that the note in question was a valid security, and might be transferred to a party insured in the company on account of a claim for a loss. *Held*, further, that a transfer by the president of the company, without a previous resolution of the board of directors authorizing the act, was valid; he being authorized by the by-laws to make contracts and transact the ordinary business of the company.

THE case is stated in the opinion of the court.

J. B. Smith & D. Lord, for the plaintiffs.

W. Kent, for the defendant.

By the Court, VANDERPOEL, J. The note in suit was transferred to the plaintiffs on the 19th day of February, 1847, by Mr. Ogden, the president of the Alliance Mutual Insurance Company, under the following circumstances: On the 28th day of August, 1846, the plaintiffs took from the company a policy on the brig "Mary Ann" for \$9,600: the voyage to be from Baltimore to Port Maria, Falmouth, and Jamaica, to either first. On the day of the transfer of this note, the vessel had not been heard from for six months; but a vessel arrived at New Orleans reported to have passed a wreck, and the name Mary Ann was reported to have been seen on it. Mr. Ogden says that he then gave to the plaintiffs for their loss, the note in suit, with other notes as collateral security. He says his hope was, that the note would come back to the company, and that they would be able to pay the loss in cash; but in May, 1847, the company failed, and all its assets were passed over to a receiver. Aspinwall, one of the plaintiffs, had been a trustee of the company, and resigned on the 19th day of December, 1846.

The first question is, for what purpose was the note given? We consider it as having been given as a subscription note, or a premium note in advance, under the twelfth section of the charter of that company. Under the decision we have made in a number of cases, affirmed by the court of appeals, this note must be regarded as a note liable to be used to pay the losses of the company. We so informed the counsel on the argument, and under this intimation, the discussion of that point was waived.

It is contended, that the transfer note was made by the president alone; and

was not authorized by a previous resolution of the board of directors; that it is therefore void and passed no right or title to the plaintiffs. Without here considering the point, whether it lies in the mouth of the defendant to question the validity of the transfer, for the reasons assigned by him, we will inquire, whether the president had a right to make the transfer; and this involves the inquiry, whether this case comes within the provisions and prohibitions of the portions of the Revised Statutes relied upon by the defendant.

The Revised Statutes, vol. 1, 591, § 8, provide that no conveyance, assignment, or transfer, not authorized by a previous resolution of its board of directors, shall be made by any such corporation of any of its real estate, or of any of its effects exceeding the value of one thousand dollars; but that this section shall not apply to the issuing of promissory notes or other evidence of debt, by the officers of the company, in the transaction of its ordinary business; nor shall it be construed to render void any conveyance, assignment, or transfer in the hands of a purchaser for a valuable consideration and without notice. This provision is found in the statute "to prevent the insolvency of moneyed corporations;" and it may well be doubted whether it extends to mutual insurance companies of this description. *Gillett v. Campbell*, 1 Denio, 520.

At all events, we are quite clear, that this act of transfer does not come within the mischief against which it was the object of the statute to guard. The act or charter creating the company provides that "all the corporate powers of the company shall be exercised by the board of trustees, and such clerks and agents and other persons, as said trustees may appoint from time to time." The trustees appointed a president, and by a by-law, which it was competent for them to make, they provided that the president and vice-president should have authority

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to pay claims upon the company, in full, or by compromise. It is in evidence that this loss was paid by the president, in the usual way, and that it was common for him to pay losses with notes. There is nothing in the case to warrant the suspicion, that the claim was not fair, or that there was any collusion between the president and the claimant, to whom the note was transferred. It is, to be sure, alleged, that Aspinwall had been a trustee, and hence, it is argued, he must have known that the company was insolvent when he took a transfer of notes in payment of his claim. The contrary, however, satisfactorily appears. The transfer was made on the 19th of February, 1847. Aspinwall resigned as trustee on the 19th of December, 1846, and the company continued to take risks and do business till it failed, in May, 1847. We are not, on the evidence in the case, authorized to conclude that the company was in point of fact insolvent when the note was transferred; nor can we yield to the idea, that Aspinwall's previous connection with the company, as trustee, can in any manner invalidate the transaction.

The whole scope of the statute to prevent the insolvency of moneyed corporations, shows that its design, by the eighth section, was to prevent *collusive* transfers of the effects of such corporations. It surely could not have meant to interfere with honest transfers, made to pay their just debts. The ninth section, p. 591, clearly shows the penal effect which is to flow from the acts there prohibited. It provides, that no conveyance, assignment, or transfer by any such corporation when insolvent, or in contemplation of insolvency, shall be valid in law. In the section next preceding, which prohibits a transfer without a previous resolution of the board of directors, the transfer is not declared void, if made without such authority. According to the familiar rule, *inclusio unius est exclusio alterius*, there is a strong implication, that the legislature did not intend to declare all transfers void, if not authorized by a resolution of the directors. The implication is stronger, when the clause omitted is, as

here, somewhat penal. The object of the eighth section was to guard against fraudulent transfers. The section employed to effect this object seems to be rather directory in its character than otherwise. But, if we are wrong in this view, we think another of the sections shows that the transfer of the note in suit is not one of the transfers or assignments intended to be guarded against.

The concluding part of the eighth section provides, "that the section shall not be construed to render void any conveyance, assignment, or transfer, in the hands of a purchaser for a valuable consideration, and without notice." We consider the plaintiffs such purchasers. If a previous vote of the board of trustees were necessary, there is no evidence that they knew that such vote had been dispensed with. Though the president says the notes were transferred to the plaintiffs as collateral security, yet they were transferred and applied as the twelfth section of the charter intended they should be applied. They were taken "for the better security of dealers," and were "negotiated for the purpose of paying a claim;" the very end which the charter intended they should serve. The consideration was not only valuable, but derives additional strength from the fact, that it is regarded by the charter as the principal one to warrant transfer. Though the president says his hope was, that the notes would come back to the company, and that they would be able to pay the loss in cash, yet it does not appear that the policy of insurance was retained by the plaintiffs, or that the original claim continued alive. The most that the president can be understood to mean is, that he hoped to be able to pay the claim in money before the note matured; a proposition to which the plaintiffs would no doubt have very readily acceded. We think it fairly inferrible that the policy was given up to the company, and that the plaintiffs parted with enough, within the case of *Stalker v. McDonald*, 6 Hill, 93, to make them purchasers for value, if the defendant were in a position to object that he came by it otherwise.

Insolvent Company. — Security Notes. — Transfer.

But does it lie in the mouth of the defendant to urge the objection here urged to the manner in which the plaintiffs came by the note? Can he ask protection as the maker of the note on the ground that it was transferred to the plaintiffs in fraud of the legal or equitable rights of the defendant? How has he been defrauded? His note has served the very purpose for which he gave it to the company. It has served to pay a just claim of the company. It is not enough for the maker of a note to say, that it was transferred to the plaintiff who prosecutes it, without a valuable consideration; but to defeat a recovery on it, he must show that it was transferred in fraud, or to the prejudice of his rights. It is no defence to an action on a promissory note, that the property of the note is in a third person, and not in the plaintiffs. Unless the possession of the note by the plaintiffs is *malâ fide*, and may work some prejudice to the defendant, the latter is not entitled to be heard on the subject. *Guernsey v. Burns*, 25 Wend. 411; *Hall v. Gird*, 7 Hill, 587.

In the latter case it was held, that it was no defence to a suit in chancery, instituted for the foreclosure of a mortgage, that the complainant's solicitor, by an agreement between him and his client, was to have part of the demand when collected by way of compensation for his services; and that even at law, the fact that the demand has thus been illegally bought or sold, constitutes no defence to the debtor in the appropriate sense of the term. If the payees of the note here have authorized the plaintiffs to collect it (which authority is involved in the transfer), we cannot perceive on what sound principle the maker can be permitted to allege (the plaintiffs being in possession of the note) that the plaintiffs did not pay value for it, or that a board of trustees did not vote for its transfer, unless he can show that he was defrauded, or lost some defence he might have had against the payees, had they retained it. Here the defendant had no defence whatever against the insurance company, as

the note was given for the purpose of enabling the company to pay claims. How were the defendant's rights, in any respect, prejudiced by the transfer? It was not transferred in fraud of any of his rights, and it does not lie with him to object to the manner in which the plaintiffs came by the note. We think the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

This case was affirmed in 1850, by the court of appeals, *sub nom. Howland & Aspinwall v. Meyer*,¹ when the following opinion was delivered:—

GARDNER, J. The note in question was a valid security in the hands of the insurance company, the original holders, and could have been enforced by them against the defendant. *Deraismes v. The Mutual Ins. Co.* 1 Comst. 371.²

Was it duly transferred by the insurance company to the plaintiffs? is the question in the present case. The twelfth section of the act under which this company was incorporated provides "that the company, for the better security of its dealers, may receive notes for premiums in advance of persons intending to receive its policies, and may negotiate the same for the purpose of paying claims or otherwise, in the course of its business." *Sess. Laws*, 1843, p. 71. These powers were essential to the existence of incorporations of this sort. It was anticipated that their capital would consist chiefly of notes, received for premiums, and that unless they were rendered available, the corporation would be compelled to suspend operations upon the first serious loss that occurred. They were therefore authorized to negotiate their premium notes for the purpose of paying claims, or otherwise, in the course of their business.

The judge ruled that the testimony established, "that this note was transferred to the plaintiffs by the president of the company for a loss, in the usual way, and in the ordinary course of business, according to their custom to pay in notes." As there was evidence tending

¹ 3 Comst. 290.² *Ante*, p. 606.

Misrepresentation. — Estoppel. — Premium Note.

to prove these facts, the finding of the judge is conclusive, and the negotiation of this note is accordingly brought within the very letter of the twelfth section.

But if the facts had been otherwise, I apprehend that the company were not restricted by the statute to a negotiation for the purpose of payment exclusively. They might procure the note to be discounted, and apply the avails in discharge of their responsibility of losses incurred; or if this could not be done, the same result might be obtained by a transfer of the notes to the plaintiffs, upon the indorsement of the company, the creditor giving time until the securities matured. In a word, any *bonâ fide* settlement of a presumed loss, contingent or absolute, made with the dealers of the company in the usual course of business, was, I think, authorized by the comprehensive language of the statute.

It is, however, objected that the assignment of the president was not obligatory upon the company. Their corporate powers were to be exercised according to their charter, by a board of trustees and such other agents as they might appoint. The president was such agent. This is manifest not only from the general usage of the company, but from their by-laws, which empower "the president, vice-president, or either of them, to make contracts for the corporation, to transact all its ordinary business, and to perform whatever belongs to the executive department." 1st By-law. The negotiation of notes in the usual course of business was

an act of this description, and it is accordingly found as a fact, that "the plaintiff dealt with the president as the authorized agent of the company, in the usual way, and without notice."

The eighth section of the article, to prevent the insolvency of moneyed incorporations, it is said, prohibits this transfer, as it was not authorized by a previous resolution of the board of directors. 1 R. S. 591, § 8. To this objection there are two answers. First. If the eighth section conflicts with the charter of this company, the former must yield to the latter, as the last expression of the legislative will. Second. There is evidence to show that the policy was surrendered by the plaintiff at the time of the adjustment of the loss, and in consideration of the assignment of the securities in question. As the judge reports the facts, the plaintiffs were in possession of the notes honestly and fairly, for a good claim, without notice of any want of authority in the president to make the transfer. Assuming these facts to be true, the plaintiffs were *bonâ fide* holders of the note for a valuable consideration without notice, and consequently not within the exception established by the section of the Revised Statute above mentioned. The provision is, that the section shall not be so construed as to render void any assignment or transfer in the hands of a purchaser for a valuable consideration and without notice. The judgment of the superior court must be affirmed.

Judgment affirmed.

FROST vs. THE SARATOGA MUTUAL INSURANCE COMPANY.¹

(Supreme Court, New York, January Term, 1848.)

Misrepresentation.—Estoppel.—Premium Note.

An insurance company, by making an assessment on a premium note with knowledge of a misrepresentation made by the assured in his application, will be estopped to allege the fact in an action on the policy.

If the policy is void by reason of a false warranty, the premium notes will be void for want of consideration.

¹ 5 Denio, 154.

THE case is stated in the opinion.

G. D. Beers, for the plaintiff.

N. Hill, Jr., for the defendant.

By the Court, BEARDSLEY, C. J. A new question is presented in this case, and one, it must be admitted, of some novelty, in its application to a case like this, and which has therefore been examined with more than ordinary care and attention.

The contract of insurance between these parties was entered into in September, 1838, and I assume that the plaintiff, by his application for insurance, which was made a part of the contract, engaged that there was no building within less than ten rods of the store insured, except those mentioned in said application. This was in law an express warranty to that effect by the plaintiff, and which is shown to have been untrue in point of fact, for there was at least one building, and it would seem more than one, within the distance stated, of which no mention was made in the application. If this fact, which constitutes a breach of the warranty, is to be taken as a part of the case, the plaintiff cannot recover. Of this no doubt can be entertained. But the plaintiff insists that the defendants, by certain acts on their part, acquiesced in and acted on by him, have precluded themselves from setting up this breach of warranty as a ground for holding the contract of insurance void *ab initio*. The fire occurred in the spring of 1840. In the course of that year, the defendants were fully apprised that the application for insurance did not truly describe all the buildings within the prescribed distance, but had omitted to make mention of one or more such buildings; yet subsequently, and in 1841, 2, and 3, the defendants made assessments on the premium note of the plaintiff, given when the policy was issued, and which several assessments were thereupon paid by the plaintiff. This, he insists, should estop the defendants from showing the facts constituting this breach of the warranty on his part; and if they appear by the evidence given in the case, the defendants should not be allowed to set them up as a defence to an action on the policy.

I regard it as clear that if the policy was originally void, on the ground now taken by the defendants, that is, a breach of the plaintiff's contract of warranty, the premium note was also

invalid. The only consideration for the note, as is expressed on its face, was this policy; and if that was void, there remained not a scintilla of consideration, and the note, consequently, could not be enforced.

The plaintiff was only liable on this note as a member of the corporation, — the Saratoga County Mutual Fire Insurance Company; he not being one of the persons named in the charter, nor the heir, executor, administrator, or assignee of any person who had been a corporator, and he could only become such member by effecting insurance in the company. Laws of 1834, p. 530, *act of incorporation*. For this purpose a valid contract of insurance, including both policy and note, one being the consideration for the other, was indispensable. If for any cause, one was invalid in its inception, so was the other, and no membership could be acquired. But if both were valid, membership was secured, and the party insured not only was bound to make payment of his premium note, as the directors might deem requisite (§ 4), but the property insured also became thereby pledged to the company for the payment of all losses, as specified in the act of incorporation, §§ 5, 8. These are burdens to which the member subjected himself; in return for which he has the policy of insurance on his property, and the right to his proportion of whatever profits may be made by the company. But the policy being originally void, no membership could be thereby created, and no right to profits could arise. It would seem to follow that, in such a case, the premium note must be held invalid, for the want of a legal consideration to uphold the promise. The charter of the company contemplates, and good faith and fair dealing require, that the entire contract of insurance, including the premium note on the one hand and the policy of insurance on the other, with all their necessary concomitants and consequences, should exist or fall together. The note cannot be valid unless the policy also was so in its inception; and unless both were so originally in this case, no membership was acquired by the plaintiff. All this I hold to be clear upon the terms and spirit of the charter of incorporation, and the true nature of the contract between the parties.

The defendants, with full knowledge of the facts invalidating the policy, have chosen to act upon the premium note of the

plaintiff as an available security in their favor, and which he was bound to pay. Several sums have accordingly been assessed by the directors of the company, and payment thereof required on said note. These payments have been made by the plaintiff, and the question is presented, Can the defendants, who have thus affirmed the original and continuing validity of the premium note, in which the plaintiff has fully acquiesced, be allowed to set up that this policy, which formed the only consideration of the note, was never valid; and that, on the sole ground of a breach of warranty on the part of the plaintiff, the fact constituting such breach of warranty being as well known to the defendants when they exacted and received payment on the note as they are at the present time? This is the point to be determined, and I should certainly, with great reluctance, come to the conclusion that the defendants can be allowed to occupy the position they now assume. It is wholly inconsistent with the ground taken by them when they called for payment on the premium note, and I think common justice forbids any change of position in this respect. It is a question of ethics, as was said in *Dezell v. Odell*, 3 Hill, 225, and morality requires that these defendants should be held strictly to the ground they have chosen to assume for themselves. An estoppel, according to Lord Coke, is where "a man's own act or acceptance stoppeth or closeth up his mouth to allege the truth." Co. Lit. 352, a. Estoppels are of three kinds, viz.: by matter of record, by deed, and *in pais*; but our present concern is with the latter class only. Such an estoppel arises where one person is induced by the assertion of another to do that which would be prejudicial to his own interests, if the person by whom he had been induced to act in this manner was allowed to contradict and disprove what he had before affirmed. In the case of *Pickard v. Sears*, 6 A. & E. 469, the principle is thus stated by Lord Denman: "The rule of law is clear that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In the case of *Dezell v. Odell*, *supra*, Cowen, J., said: "We then

have a clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an estoppel *in pais*." The estoppel is allowed to prevent fraud and injustice, and exists wherever a party cannot in good conscience gainsay his own acts or assertion. The authorities upon this point are numerous, and all speak the same language. *Gregg v. Wells*, 10 A. & E. 90; *Coles v. The Bank of England*, Id. p. 437; *Sandys v. Hodgson*, Id. 472; *Stephens v. Baird*, 9 Cowen, 274; *The Welland Canal Co. v. Hathaway*, 8 Wend. 480; 2 Smith's Lead. Cas. pp. 458, 467, notes; 1 Greenl. Ev. §§ 22, 27, 204, 207. It makes no difference in the operation of this rule whether the thing admitted was true or false; it being the fact that it has been acted upon, that renders it conclusive. Id. 208, 209. Here the defendants in affirming the validity of the premium note, necessarily affirmed that the policy was also originally valid. This affirmation was acted upon by the plaintiff, for he advanced money in consequence of its being made, and the defendants shall not now be allowed to set up any fact *dehors* the policy, in order to impeach the original validity of the contract of insurance. *Qui sentit commodum sentire debet et onus*. The defendants have derived advantage from this contract, and they should now bear its burden. I think the nonsuit should be set aside and a new trial ordered.

No objection is made to the point submitted on behalf of the defendants, that the declaration was not adapted to the case as proved, although a suggestion to that effect was made at the circuit. I have not examined that question. Looking only at what appears on the face of this policy, it is unobjectionable, for nothing there appears to impeach it. The conclusion at which I have arrived does not, however, rest on the idea that the policy was certainly valid in its inception, but on the ground that these defendants have precluded themselves from setting up any fact out of the policy to show that it was originally void.

New trial ordered.

See *Silloway v. Neptune Ins. Co.* 12 Mut. Ins. Co. 66 Penn. St. 22 (1870); *Gray*, 73 (1853); *Stagg v. Insurance Co.* *Miller v. Mutual Benefit Life Ins. Co.* 31 10 Wall. 589, (1870); *Hyatt v. Wait*, Iowa, 216 (1871); *Bigelow*, Estoppel, 37 Barb. 29 (1862); *Elliott v. Lycoming* 506, 526.

LEONARD WILLIAMS & MARCUS W. BLISS vs. THE VERMONT
MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Vermont, February Term, 1848.)

Limitation of Actions.—Subsequent Acknowledgment.

Where the directors of the Vermont Mutual Fire Insurance Company voted to disallow a claim for loss by fire, under a policy issued to two persons jointly, for the reason that one of the claimants had been indicted for setting fire to the building burned, and immediately gave notice of their determination to the claimants, which was more than sixty days previous to the then next stated term of the county court in Washington county, and also in the county where the claimants resided and where the property was situated: it was *Held*, that the action for the loss was barred, under the act of incorporation of the company, by not being commenced to such next stated term; notwithstanding the directors subsequently, and after the claim was so barred, voted to pay to the claimant who was not so indicted one half of the amount of the whole loss.

A cause of action upon a policy of insurance, for a loss by fire, which has been barred by suffering the time limited in the charter of the insurance company for commencing actions to expire, is not capable of being revived by an acknowledgment, or a new promise.

ASSUMPSIT upon a policy of insurance, dated September 16, 1842, by which the defendants insured a saw-mill belonging to the plaintiffs, against loss by fire, to the amount of \$400, for six years. The plaintiffs alleged, that the mill was burned September 2, 1843, and that notice thereof was duly given to the directors of the company. The writ was made returnable to the April term, 1845, of Rutland county court. The defendants pleaded first, the general issue; second, that by the seventh section of their act of incorporation it is provided, that in case of any loss or damage by fire happening to any member, upon property insured in and with said company, the said member shall give notice thereof in writing to the directors or some one of them, or to the secretary of said company, within thirty days from the time such loss or damage may have happened; and the directors upon view of the same, or in some other way, as they may deem proper, shall ascertain and determine the amount of said loss or damage; and if the party suffering is not satisfied with the determination of the directors, the question may be submitted to referees, or the said party may bring an action against said company for loss or damage, at the next

¹ 20 Vermont, 222.

• Limitations of Actions. — Subsequent Acknowledgment.

court to be holden in and for the county of Washington, or in the county in which said party may reside, or in which said loss or damage may have happened, and not afterwards, unless said court shall be holden within sixty days after said determination; but if holden within that time, then at the next court holden in said county thereafter, &c.; that on the 4th day of January, 1844, the defendants, by their directors, rejected and disallowed the whole of the plaintiffs' claim, — of which notice had been received, as alleged in the declaration; that the defendants were notified of the determination on the 10th day of January, 1844; and that this was more than sixty days previous to the April term, 1844, of Washington county court, and also more than sixty days previous to the April term, 1844, of Rutland county court; and that so this action should have been brought to one of those terms. The defendants also pleaded a third plea, in substance the same with the second.

To the second plea the plaintiffs replied, that although it was true that the directors on the 4th day of January, 1844, decided to reject the plaintiffs' claim, and give notice to the plaintiffs thereof, yet that the directors, on the 7th day of August, 1844, reconsidered their former determination, and did then, and not before, finally and conclusively decide upon, ascertain, and determine the amount of loss sustained by the plaintiffs; and that this was less than sixty days previous to the September term, 1844, of Rutland county court, and that so this action was properly brought to the next term subsequent, being the April term, 1845, of said court. To the third plea the plaintiffs replied, that after the time mentioned in that plea, to wit, on the 7th day of August, 1844, the directors ascertained and determined the amount of the plaintiffs' loss, and that the next subsequent term of Rutland county court, being the September term, 1844, was holden within sixty days after such determination was made, to wit, thirty days, and that the plaintiffs not being satisfied with the determination of the directors, brought their suit to the next subsequent term of the court in Rutland county, being the April term, 1845, without this, that said directors, at Montpelier, on the 4th day of January, 1844, ascertained and determined that there was no loss for which the defendants ought to pay, and rejected and

disallowed the claim of the plaintiffs for said loss, and refused to pay the plaintiffs anything for the same, — (following the words of the plea). To the replication to the second plea the defendants rejoined, that they did not on the 7th day of August, 1844, nor at any other time after the said 4th day of January, 1844, reconsider their former determination and finally and conclusively decide upon, ascertain, and determine the amount of loss sustained by the plaintiffs. To the replication to the third plea the defendants rejoined, that the directors, on the 4th day of January, 1844, ascertained and determined that there was no loss to the plaintiffs by fire, as in the declaration mentioned, for which these defendants ought to 'pay, and rejected and disallowed the plaintiffs' claim for said loss, and refused to pay the plaintiffs anything therefor. Upon these rejoinders issue was joined. Trial by jury, April term, 1847, Hall, J., presiding.

On trial, the plaintiffs gave in evidence a vote of the directors of the company, passed January 4, 1844, which was in these words: "Voted, to reject the claim of Bliss & Williams, of Castleton, for loss — Notice, September 27, 1843 — No. 33,206, Williams being indicted for the setting the mill on fire;" also a vote of the directors, passed August 7, 1844, which was in these words: "On report of J. T. Wright in case of the claim of Williams & Bliss, of Castleton, for loss in September, 1843 — Notice, September 27, 1843 — No. 33,206, — whole rejected by the board Jan. 4, 1844, — on an examination of an agreement of said Bliss with said Wright, as *per* his report, to allow said M. W. Bliss for one half of said loss on the saw-mill, deducting one half of the amount saved, — Voted, to allow said Marcus W. Bliss the amount as reported for his half of saw-mill, the amount of \$195.00." And upon this evidence the court decided, that the plaintiffs were entitled to recover upon the issues formed upon the second and third pleas.

Under the general issue, after the plaintiffs had given evidence tending to prove the facts alleged in their declaration, the defendants gave evidence tending to prove, that the plaintiff, Williams, purposely set on fire and burned the mill described in the declaration, at the time the same was destroyed, as mentioned in the declaration; and the defendants requested the

court to charge the jury, that they would be warranted in finding that Williams so burned the mill on less evidence in this case than upon an indictment against him for arson in setting the mill on fire. But the court instructed the jury, that it would require the same amount of evidence, on the trial of this action, to show that Williams purposely set the mill on fire, as would be necessary upon trial on an indictment against him for arson in so doing.

Verdict for the plaintiffs for \$239.73. Exceptions by defendants.

S. Foot & S. H. Hodges, for defendants.

E. N. Briggs & C. L. Williams, for plaintiffs.

The opinion of the court was delivered by

DAVIS, J. A verdict having been returned for the plaintiffs, for one half of the amount of the loss sustained by them in the destruction of their saw-mill by fire, the other half having previously been allowed and paid to Bliss, one of the plaintiffs, exceptions were taken by the defendants to the directions given by the county court, in respect to the issues of fact formed upon the defendants' second and third pleas. A farther exception was taken to the decision of the county court, that, in order to exempt the company from responsibility, upon the allegation that Williams, one of the plaintiffs, fraudulently set fire to the mill, and thus caused its destruction, the same amount of evidence was necessary which would be requisite to convict on trial of an indictment for the same offence, — which is now abandoned. As to the other point, it is obvious that the bill of exceptions is so imperfect, that it fails to present, with any distinctness, the points of law to which counsel have directed our attention. The court, it seems, upon proof by the plaintiffs of the two votes in reference to this claim, adopted by the directors in January and August, 1844, decided that the plaintiffs were entitled to recover.

The principal question raised in argument is, whether the plaintiffs commenced this action within the time limited by the seventh section of the act incorporating the company; which section requires the action to be brought either in the county of Washington, the central place of business of the company, or in the county where the plaintiffs reside, or in that in which the

property destroyed was situated, which two last are here the same, at the term of the court next after the directors shall have disallowed the claim, in whole or in part, unless such term occur within sixty days from such disallowance; in which contingency the action may be brought at the next succeeding term.

The loss in this case, it appears, happened on the 2d day of September, 1843; and notice in writing was given to the proper officers on the 27th of the same month. On the 4th of January, 1844, the directors, at a regular meeting to take this claim into consideration, voted to disallow it entirely, on the avowed ground that Williams had been indicted for setting the mill on fire. Notice of this determination was given to the plaintiffs on the 10th of the same January. This action was commenced at the April term, 1845, previous to which time, and subsequent to the passing of the vote aforesaid, two regular terms of the county court intervened, one in April and the other in September, the earliest of which was more than sixty days after that vote. It is obvious, then, if the proceedings of the board on that occasion are to be regarded as the *determination* at the next court after which the action was required to be brought, the plaintiffs were too late and cannot recover. The plaintiffs contend, that they are not so to be regarded; that the subsequent resolution of the same body in August, allowing to Bliss, in consequence of this loss, the sum of \$195, being one half thereof, after deducting half of the property saved, should be taken in connection therewith; and that, when thus viewed, it cannot be said that any final determination was made, as to how much the company were willing to pay, or whether anything, until this last vote was adopted. Or at any rate, it is supposed that these last proceedings may be regarded as an acknowledgment, or renewal, of the original liability, and thus afford, as in ordinary cases under the statutes of limitation, a satisfactory answer to the plea.

Taken by itself, no one can doubt that the vote of January 4th was, in form and substance, a full and distinct determination of the board of directors, within the meaning of the seventh section of the act of incorporation, as construed by this court in the case of *Dutton v. The Vt. Mutual Fire Ins. Co.* 17 Vt. 369. The claim was wholly disallowed, on the ground of a supposed fraudulent and felonious destruction of the property

Limitations of Actions. — Subsequent Acknowledgment.

insured, by Williams, one of the plaintiffs. It is not doubted but that the fact, if true, would afford a sufficient justification for the vote, and a complete defence to any action that might be brought upon the policy. There would be no necessity of showing that Bliss participated in the fraudulent act. The plaintiffs could have treated the vote as such, and have brought their action at the April term of the county court, 1844, if they elected to sue in Rutland County. They omitted to do so, and before the subsequent proceedings of August 7th were had, their right of action had been barred four months. If the claimants could have sued there, were they not bound to do so?

But I apprehend the last vote cannot be considered as a reconsideration of the former one. It does not purport to be such. There is no intimation that farther investigations into the facts of the case had induced a change of views, in respect to the ground on which the whole claim was rejected. The former vote is referred to, but not rescinded, nor modified as a rejection of the *joint* legal claim of Bliss and Williams, the joint owners of the saw-mill destroyed. The directors, apparently upon equitable considerations, inasmuch as no imputations of fraud rested upon Bliss personally, and in a spirit of gratuitous liberality, decided to pay one half of the loss to him individually. He could have had no legal claim upon the company in that form. If he made one in the form in which it was finally allowed, it was a proceeding wholly independent of all regular action under the policy, and could consequently affect in no way any rights or interests depending upon it. We cannot therefore regard this collateral proceeding as having any effect in restoring to the two partners any joint rights, which through their own negligence had been extinguished before that proceeding was had.

Still less reason is there for holding that the vote of August can be regarded as an acknowledgment and revival of the claim sued, expressly, or by implication, in consequence of payment of a part, supposing payment to have followed the vote, as it doubtless did.

Is there good ground for the opinion that a cause of action of this kind is susceptible of renewal, when once barred, as matters of indebtedness are, under the ordinary statutes of lim-

itation? No inconsiderable portion of the argument of the defendants' counsel has been devoted to this point. Nothing decisive can be predicated in respect to it, from the language of the act, which is, that the party may bring an action at the court next to be holden, &c., and *not afterwards*,—language very nearly identical with that used in the general statutes of limitation. It is quite different from that employed in respect to the presentation of claims to commissioners upon an insolvent estate, where, if not presented by the time prescribed, they are declared to be forever barred. Accordingly, it was determined in the case of *Hunt v. Fay, Adm'r*, 7 Vt. 170, that a creditor residing in New Hampshire, where the intestate had resided, who had failed to present his claims there while the commission was open, had lost all right to have them allowed under an ancillary administration in this state; they being regarded as extinguished. Nor is the action founded upon a tort, or to be regarded in the light of a penalty, and for that reason incapable of renewal, as determined in *Hurst v. Parker*, 1 B. & Ald. 92; *Oothout v. Thompson*, 20 Johns. 277. The claim is founded in contract. It is, however, a contract of a peculiar description, resembling a wagering contract, in which the insurance company for a small premium advanced, and afterwards annually renewed by instalments graduated according to the aggregate losses of all the insured, undertake to indemnify each one to a stated amount, in the event of a casual loss by fire. The amount for which they may become responsible greatly exceeds the premium paid, or agreed to be paid; and the liability depends upon a contingency over which neither party has any control. For whatever the company may eventually have to pay, they become liable by positive stipulation, rather than upon a principle of natural justice, growing out of an adequate consideration received. So far as this liability exceeds the premium paid and secured, it more nearly resembles a penalty than a simple debt, and thus would more naturally fall into the class of cases, in which statutes prescribing a time within which suits shall be brought, are construed as limitations upon the liability, rather than mere denials of a remedy.

Other considerations, arising from the nature of these contracts, and the necessity of prompt and speedy adjustment of

Limitations of Actions. — Subsequent Acknowledgment.

all losses claimed, in order that all necessary assessments may be made, while those on whom they are to be made remain members of the company, would seem to point to a similar result. In addition to this, the case is quite analogous to those contracts in which there is a positive stipulation to do some act, provided specific demand be made within a specified time, or provided some other precedent condition be performed. The limitation is contained in the very act of incorporation; it is, in effect, a part of the contract between the whole company in the aggregate, and every individual member. In the event of a loss which is not adjusted by the corporation to the satisfaction of the sufferer, and if no reference shall be agreed on, the former become liable to a suit at law, provided such suit be instituted within a short but definite period, adjusted to its business exigencies. If the prescribed term be suffered to elapse without suit, there remains no longer a legal liability in any form. There is no indebtedness, which, though by the operation of the statute, incapable of being enforced by suit, may nevertheless be reanimated and invested with that quality, by an acknowledgment or new promise. Such we believe to be the proper construction of this act.

It is unnecessary, therefore, to inquire whether the circumstances which transpired in this instance, subsequent to the 4th of January, were of a character, which, in the ordinary case of a debt, would remove the statute bar, either as an acknowledgment of the debt, or a part payment. For the same reason it is unnecessary to examine into the correctness of the ruling of the county court in respect to the issue formed upon the third plea.

The judgment of the county court is reversed and a new trial granted.

See *Ketchum v. Protection Ins. Co.* 1 Allen (N. B.) 136, *post*; *Cray v. Hartford Ins. Co.* 1 Blatchf. 280, *post*; *Gooden v. Amoskeag Fire Ins. Co.* 20 N. H. 73, *post*; *Wilson v. Aetna Ins. Co.* 27 Vt. 99 (1854); *Grant v. Lexington Ins. Co.* 5 Ind. 23 (1854); *Lampkin v. Western Assur. Co.* 13 Up. Can. Q. B. 237 (1855); *Amesbury v. Bowditch Mut. Ins. Co.* 6 Gray, 595 (1856); *Nute v. Hamilton Mut. Ins. Co.* 1b. 180; *Northwestern Ins. Co. v. Phoenix Oil & Candle Factory*, 31 Penn. St. 448 (1858).

The above and many other cases establish the doctrine that the limitation clause is valid and binding. But see *contra*, *Eagle Ins. Co. v. Lafayette Ins. Co.* 9 Ind. 443 (1857); *French v. Lafayette Ins. Co.* 5 McLean, 461 (1853). The last named case was, however, recently overruled in *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 386, 392.

Rebuilding. — Assignment.

The doctrine concerning the effect of a subsequent acknowledgment or new promise, after the expiration of the time limited for suit, does not seem to have arisen elsewhere. It has indeed been said in *Ketchum v. Protection Ins. Co.*, *supra*, that the limitation clause cannot be waived; and the same doctrine is repeated in *Lampkin v. Western Assur. Co.*, *supra*, but the contrary is assumed in several cases. See *Ames v. Union Ins. Co.* 14 N. Y. 254

(1856); *Grant v. Lexington Ins. Co.* 5 Ind. 23 (1854); *Gooden v. Amoskeag Ins. Co.* 20 N. H. 73 (1849); *Schroeder v. Keystone Ins. Co.* 2 Phil. (Pa.) 286 (1858); *Ripley v. Aetna Ins. Co.* 29 Barb. 552 (1859); *S. C.* 30 N. Y. 136 (1864). See also *Peoria Ins. Co. v. Hall*, 12 Mich. 202 (1864); *Peoria Ins. Co. v. Whitehill*, 25 Ill. 466 (1861); *Longhurst v. Star Ins. Co.* 19 Iowa, 364 (1865).

JOSEPH A. TOLMAN vs. THE MANUFACTURERS' INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1848.)

Rebuilding. — Assignment.

- A clause in a policy of fire insurance allowing the insurers to rebuild is not affected by an assignment, assented to by them, directing the company to pay the loss to another.

THE report of the trial below, before Shaw, C. J., was as follows:—

Charles Wellington, being the owner of an unfinished dwelling-house in Charlestown, which was under a mortgage for \$800, sold and conveyed his interest therein for \$200, to Robert Kellen, who was to pay the sum due on the mortgage.

On the 3d of May, 1845, the defendants, by a policy duly executed, insured Kellen against a loss of the premises by fire, in the sum of \$1,000, for one year. The policy contained a clause by which it was provided, that the sum insured should be paid to the said Kellen, within sixty days after proof of such loss or damage, unless within sixty days after notice of such loss or damage, the said company shall have replaced the said property, lost or damaged, with other of the like kind and quality, at the election of the said company.

The building insured was destroyed by fire on the 27th or 28th of May, 1845, and due notice of the loss was given to the defendants. Shortly afterwards, Kellen made an order in writing indorsed on the policy, directing the defendants to pay the

¹ 1 Cush. 73.

Rebuilding. — Assignment.

loss under the same to the plaintiff. This arrangement was assented to by the president of the defendants, acting for them, by an indorsement in writing on the policy.

The order and assent are as follows:—

“ May 29th, 1845. Pay the loss under the within policy to
Joseph A. Tolman. Robert Kellen.

“ Assented to, C. W. Cartwright, Pres.”

The plaintiff demanded payment of the loss, at the office of the defendants, who refused to pay the sum; but the president said, that he was going to rebuild the house; and the defendants did accordingly replace the building destroyed with another of the like kind and quality, and of equal value.

The plaintiff brought this action on the policy to recover the amount of the loss.

It was contended, on the part of the plaintiff, that the assent of the president (whose authority in this respect was not denied) was a waiver, by the company, of their right to rebuild, and an agreement to pay the loss in money to the plaintiff, sufficient to enable him to maintain this action therefor, in his own name.

On the part of the defendants it was contended, that this assent was not an election to pay the money, or a waiver of their right to rebuild; but that they retained that right under the policy, as well after the assignment as before.

The judge ruled: 1. That the indorsement on the policy, and the assent thereto by the president of the defendants, did not amount to an election to pay the money and waive the right to rebuild, but was merely an assent to the assignment by the plaintiff; that the defendants had notwithstanding a right to rebuild; and, having rebuilt, that was a satisfaction of the loss.

2. That the order indorsed on the policy was not in the nature of a draft for money, and that the assent thereto by the defendants was not an acceptance, upon which an action would lie by the plaintiff against the defendants.

3. That the indorsement by the assured was an authority to the plaintiff to settle with the defendants, and their assent thereto was an admission and acknowledgment of that authority; or it amounted to an assignment of a chose in action, which did not authorize the plaintiff to bring an action in his own name.

A nonsuit was thereupon entered, subject to the opinion of the whole court. If the directions were right, judgment was to be entered on the nonsuit for the defendants; otherwise, the defendants were to be defaulted, and the case to be referred to an auditor to determine the amount due, or a new trial was to be had, as the court might order.

A. B. Merrill, for the plaintiff.

C. A. Welch, for the defendants.

FORBES, J. The view which the court take of this case makes it necessary to consider only the ruling first stated; because, if the order indorsed upon the policy ought not to receive the construction put upon it by the plaintiff, the action cannot be maintained. The plaintiff insists that it is an order for the payment of money absolutely; that it has no connection with the policy, except by way of reference to it, for the purpose of ascertaining the amount to be paid, and having been accepted, is binding upon the defendants; that it does not in fact differ in any essential particular from a common order for money.

The stress of the argument for the plaintiff rests upon the import of the word pay, as used in the indorsement. It is contended that the word, in this connection, can imply nothing but an acquittal or discharge of the obligation in money, and that such is the meaning, force, and effect of the term in this and similar instruments. If this construction be correct, the defendants having agreed to compensate the loss in money, may fairly be presumed to have waived their right to replace the building. But we are not satisfied that this construction is correct, or that the meaning of the term is restricted, in the manner supposed, by the *jus et norma loquendi*. An obligation to deliver merchandise is familiarly said to be paid by a delivery of the merchandise, and the use of the term, in this connection, is common, and strictly appropriate. Notes payable in goods or money, at the election of the promisor, are not of unfrequent occurrence. "Pay the within" to a third person, indorsed upon a note of this description, together with a delivery of the note, would operate as an assignment in equity, and, if assented to by the promisor, might lay the foundation for an action in the name of the assignee. But this would not

Rebuilding. — Assignment.

change the nature of the original promise; the note would continue to be payable in goods or money, at the option of the maker. Yet if the effect of the word "pay" be such as the plaintiff contends, the election of the promisor would be at an end, and the note must be paid in money.

"To pay" is defined by lexicographers, "To discharge a debt, to deliver a creditor the value of a debt, either in money or goods, to his acceptance or satisfaction, by which the obligation of the debt is discharged; to discharge a duty created by promise, or by custom, or by the moral law; to fulfil, to perform what is promised." Webster's Dict.

To pay, therefore, is to discharge an obligation by a performance according to its terms or requirements. If the obligation be for money, the payment is made in money; if for merchandise or labor, a delivery of the merchandise or a performance of the labor is payment; or if for the erection of a building, performance according to the terms of the contract is payment. The indorsement in this case is not, "Pay the loss in money," or even "Pay the amount of the loss," but simply, "Pay the loss." We consider the effect of this indorsement to be the same as if written out more fully in this manner: "Pay or discharge the obligation arising from the loss upon the policy to, or for the benefit of Joseph A. Tolman;" in other words, that it operated as an assignment to the plaintiff of Kellen's claim under the policy, without affecting, in the least, the right of the defendants to replace the building, or to pay the amount of the loss in money, at their election, according to the terms of the policy. The defendants having replaced the building, this action cannot be sustained.

It appears from the papers on file, that on the 12th of April, 1845, Kellen mortgaged the premises to the plaintiff, to secure the sum of five hundred dollars. The plaintiff, then, was a second mortgagee, and this fact discloses an inducement, on the part of the plaintiff, to obtain the control of the policy; for if the defendants had paid Kellen the amount of the loss in money, the plaintiff, so far as appears, would have had no means of compelling him to expend it in the erection of another building; and to that extent the plaintiff's security would have been impaired; whereas the assignment placed the plain-

tiff in a situation in which he must be benefited, whether the defendants erected another building or paid the amount of the loss in money.

The court are of the opinion that the nonsuit must stand, and, according to the agreement of the parties, judgment is to be entered for the defendants.

CHARLES HEATH *et al.* vs. THE FRANKLIN INSURANCE COMPANY.¹

(Supreme Court, Massachusetts, March Term, 1848.)

Policy. — Construction. — Description. — Notice of Loss.

The property insured in this case, a brick building, was described as having "a composition roof, and occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and the Western Avenue." *Held*, that the latter part of the description, beginning with the word "situate," referred to the building insured.

Ambiguity in the description of adjoining premises considered.

Where no objection is made to the statement of loss, or no request made for further information, the statement cannot be objected to on the trial.

THE case is stated in the report of the trial before Shaw, C. J., which was as follows: —

The policy was dated January 6, 1842, and by it the defendants caused the plaintiffs to be insured to the amount of \$6,000 on their brick building, with a "composition roof, occupied by several tenants, and connected by doors with the adjoining buildings, situate at the corner of Charles Street and the Western Avenue, in Boston. A cabinet-maker's shop is in the building."

The policy also contained a clause, providing, that "in case of any loss the same is to be paid without any deduction in ninety days after proof thereof;" and a further clause, that "the assured agrees that, in case of any loss or damage, the said company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness, at any time within ninety days after notice of the loss."

¹ 1 Cush. 257.

The plaintiffs introduced evidence tending to prove that, at the time the policy was effected, a block, consisting of two brick buildings, belonging to the plaintiffs, stood at the corner of Charles Street and the Western Avenue, the most easterly of the two being directly on the corner of the street; that the last named building was much older than the other and most westerly one, and, before the latter was built, had attached to it a brick two-storied spur or L part, containing a kitchen in the lower story, and a breakfast room over it in the upper; that when the westerly building was erected the northern wall was joined on to, and built over, the spur part, so that the wall of that part was incorporated into and made a part of the northern wall of the new or westerly building, and the rooms of the latter building, in the third and fourth stories thereof, extended over the rooms in the L; that the wall between the easterly and westerly buildings was entirely of brick, from the cellar to the roof, and there were three doors through it, namely, one leading from a room in the lower floor of the easterly building, occupied as a grocery, into a corresponding room in the westerly building; a second leading from the entry of the eastern building into the lower room of what was previously the spur or L, and a third in the second story of the easterly building, leading into the room which was before the upper room of the L; that the building on the corner, at the time the policy was made, was occupied by several tenants, was covered by a flat composition roof, and had doors in the partition wall between it and the western building; that the western building was occupied by several tenants; that it had a hipped roof, with a space on the top of about one hundred feet covered with composition, the remainder containing about fourteen hundred and fifty feet, being steep, pitched, and slated; that in this building there was a carpenter's shop; and that, within the period mentioned in the policy, a fire occurred on the premises, by which the western building was partially consumed and the eastern slightly injured.

The defendants contended that the policy, upon the face of it, was void, or, if not void, that it covered the easterly house only. But the presiding judge ruled that if the wall, constituting the original western wall of the main part of the house

Policy. — Construction. — Description. — Notice of Loss.

first built, was carried up higher, and formed the easterly wall of the new westerly building, and included in such new building the former kitchen and breakfast room or L part; if there was no connection between such new westerly building and the old house but by three or four doors, such wall being carried up above the roof of the old house, to constitute the easterly wall of the new one; if each part was occupied by several tenants, and each was a brick building, the easterly house covered with a composition roof, and the westerly in part with a composition roof; and if there was a cabinet-maker's shop in the westerly building, and no cabinet-maker's shop in the easterly building, each being connected with the other by doors, then the building insured was the one lying westerly of the wall, and that lying easterly of the wall, and on the corner of Charles Street and the Western Avenue, was not included in the policy.

The plaintiffs, in order to show a notice and proof of loss, read in evidence a letter from them to the defendants' president, dated November 14, 1842, in which the plaintiffs informed him, that it had become necessary for the assured, under policy 8,650, made by the Franklin Insurance Company, to give notice of a loss or damage to the premises insured, which happened on the evening of the 12th instant, and to request that they may be indemnified, according to the effect of the policy.

The defendants contended that this letter alone was not sufficient proof of loss within the meaning of the policy, but the judge ruled otherwise, and no other evidence was introduced of any notice or proof of loss having been given to the defendants before the commencement of the action.

Other points arose on the trial, and were ruled upon, which became immaterial in consequence of the opinion of the court with reference to the question above stated.

R. Fletcher & E. D. Sohier, for the defendants.

S. Bartlett & W. Sohier, for the plaintiffs.

DEWEY, J. To what building does the policy attach? Is it the most easterly house, situate at the corner of Charles Street and Western Avenue, or the adjoining westerly house, or both; or is the description of the building proposed to be insured, as it appears in the policy, so uncertain in its application that for that cause the policy must fail altogether?

In the policy itself and on the face of it, there is nothing to create any ambiguity, as to the description of the building. But, upon proof of the circumstances, and the actual state of things in reference to the two buildings, the ambiguity arises.

The plaintiff, however, insists that, upon the proper reading of the description in the policy, it may well be taken to apply to the western building; and this would very clearly be so, if the words, "situate at the corner of Charles Street and the Western Avenue," are to be taken as referring to the "adjoining building," and not to the building insured.

But this, we think, cannot be maintained. The case does not seem to be one in which any grammatical rule, referring the words "situate," &c., to be the next antecedent, can properly be applied. Such a rule is not one of general application, especially to cases like the present, where the words are used in a continuous description of various distinct and independent circumstances, applicable to the building insured, and which, from their very nature, are distinct and independent descriptions. The object of each and all these different descriptions is to set forth fully all the essential circumstances relating to the property insured. Among these circumstances the most prominent is the location of the building to be insured. We might well expect, as a part of the description contained in the policy, a statement of the location of the particular building which was the subject of it; and it is much more natural and probable that the location of the building to be insured should be given, than the location of a building not insured, and which was only introduced incidentally to disclose the manner of the connection of the building insured with an adjacent building.

We cannot doubt that a proper reading of the policy requires that the words "situate at the corner of Charles Street and the Western Avenue" should be applied to the building insured, rather than to the adjoining building.

Having settled this point, we are then to look at the whole description and see whether it can, upon any sound principle, apply to the western building. And in reference to this inquiry it will be seen that the recital in the policy, as we have just held, varies from the description which would embrace the western house, in the most material particular, namely, the house in-

Policy. — Construction. — Description. — Notice of Loss.

sured is described as situate at the corner of Charles Street and the Western Avenue, but that is the location of the eastern house, and not the western. That part of the description, therefore, being inappropriate, the application of the policy to the western house must be shown by other parts of the same description.

We do not doubt the propriety of rejecting a particular description, which is clearly false, in order to give effect to other descriptive words, when such words are sufficient to define the object intended to be described. In such a case, the false description may be rejected as surplusage. But the difficulty here is, that we are called upon to reject that particular part of the description which is the most leading. Again, if we reject this description, we have no other elements of description sufficient to embrace any particular house as within the policy. Striking out the words "situate at the corner of Charles Street and the Western Avenue," we have no locality and no particular house insured. The matter stands thus as to the western house. Rejecting this particular in the description as false, and giving full force and effect to all the other parts of it, the description is then so substantially defective that it cannot be held to apply to the particular house which the plaintiff insists was insured. This view of the case precludes the plaintiff from recovering damages for any loss which he may have sustained in the destruction of the western house by fire.

It was suggested, that the policy might be construed to embrace the whole block, that is to say, the two buildings, and thus avoid the difficulty in the variance of the description as to situation. But we think that this cannot have been the true intention of the policy; the description clearly referring to one building, and that a building "connected by doors with the adjoining building."

The next inquiry is, whether this policy must totally fail for uncertainty in the description, or whether it may be held to attach to the eastern building, which, it was in evidence, had sustained some small damage by fire. The fact that the parties intended to cause a policy to be made as to one of these two buildings will hardly be doubted; and, having decided that the western house was not covered by the policy, it might seem to

result as a matter of course, that the policy attached to the eastern house. But such is not necessarily the consequence, as the description may be equally uncertain as to both. In such case the policy must wholly fail. But the fact that the policy was intended for the one house or the other may have some influence; and if there be not only a preponderance of evidence, resulting from the description and the actual state of things, in favor of one building rather than the other, but sufficient evidence, after rejecting the false description, to identify the particular building, we may well conclude that such building is covered by the policy, and was designed to be so by the parties. In looking at the policy with reference to its application to the eastern house, we find all the leading descriptions, and particularly that of location, to be directly applicable.

The only description which is inapplicable, and which appears by the evidence not to be true, is the recital: "A cabinet-maker's shop is in the building." This does not apply to the eastern house, and, if material, must of course be a fatal objection to the construction which makes that house the subject of the policy. As before remarked, in reference to the description in the policy, as applicable to the western building, the rules of law fully authorize the rejection of any false description, if what remains be sufficient clearly to designate the object intended to be described.

Now, in the present case, as to the eastern building, such will be the case, if the entire recital as to the cabinet-maker's shop be rejected. There will still remain all the elements essential to a definite description, the location of the building, and every circumstance necessary to its identification.

Such being the case, and the circumstances being strong to show that one of those buildings was insured; and for the reason already stated, the western not being described in the policy; we are of opinion that the recital, "A cabinet-maker's shop is in the building," may be rejected as erroneous, and that the policy will then attach to the eastern building.

The only other point, which, in this view of the case, is necessary to be considered, is the sufficiency of the notice of the loss and damage. The notice was in very general terms, conveying no intelligence as to the amount of damage, containing no

statement of the particular circumstances connected with the cause of the loss, and making no demand of any specific sum of money as an indemnity. .

The sufficiency of this notice is not to be determined solely by reference to general principles applicable to other policies, but in part also upon the peculiar provisions of this policy, or the stipulations which it contains regulating this subject. The provisions relative to notice of loss are very general, and are wholly contained in the following clauses: "And in case of any loss the same is to be paid without any deduction in ninety days after proof thereof." "And the assured agrees, that in case of any loss or damage, the said company shall have the right to replace the articles lost or damaged with others of the same kind and equal goodness, at any time within ninety days after notice of the loss." It would have been entirely competent for the company to have required a distinct specification of the damages claimed by reason of the loss, or other precise and minute particulars, but they have not done so.

The first of these provisions is probably inartificially expressed to carry out the object of it, as it provides that payment shall be made in ninety days after proof of the loss. This was probably copied from the specifications in marine policies, where certain preliminary proofs are required.

We think, considering the general terms in which notice is required by the provisions of the policy, and applying a principle of law which is applicable in cases of a like character, that the notice may be regarded as sufficient. According to the principle of law referred to, when underwriters make no objection to a deficiency in the preliminary proofs, or to the notice given, but put their denial of liability upon other grounds, such conduct is a waiver of the objection of a defective notice. *Vos v. Robinson*, 9 Johns. 192. The principle of waiver is also recognized in the case of the *Ætna Ins. Co. v. Tyler*, 16 Wend. 401, where the court say: "The law is well settled in this state, that if there is a formal defect in the preliminary proofs required by the policy, and which could probably have been supplied, had any objection been made by the underwriters to the payment of the loss on that ground; if the insurers do not call for the document, or make an objection on the ground of its

Proof of Loss. — Forthwith. — Waiver.

imperfection, but put their refusal to pay distinctly on some other ground, the production of such further preliminary proof will be considered as waived." Good faith on the part of the underwriters requiring, in such a case, that if they mean to insist upon a mere formal defect of this kind in the preliminary proofs, they should apprise the insurer that they consider the same defective.

Cases of fire insurance seem, less than marine, to require particularity in their notice of loss. Losses by fire more usually fall under the inspection of the insurer's agents; and a general notice will be sufficient to enable the insurers seasonably to acquire a more minute knowledge of the loss, if such knowledge be desirable.

We put the decision in the present case, however, upon the provisions of this policy, and the legal principle properly applicable to it, that no objection being taken to the form of the notice, and no further or particular information being required by the insurers, no objection can now be taken upon that ground to the plaintiff's right to recover.

The ruling at the trial, on the first point, being now held erroneous, the verdict must be set aside, and a new trial granted.

This ruling was confirmed upon a subsequent trial of the case upon substantially the same facts.

ST. LOUIS INSURANCE COMPANY vs. ROBERT KYLE.¹

(Supreme Court, Missouri, March Term, 1848.)

Proof of Loss. — Forthwith. — Waiver.

Where, by the conditions of a policy of insurance, notice of the loss is required to be given *forthwith*, it is only necessary that the notice should be given with due diligence under all the circumstances of the case.

The receiving a notice and failing to make objections to its being given in time, are no waiver of the notice.

Formal defects in the preliminary proof of loss may be regarded as waived by the insurers' pleading their refusal to pay on other grounds, and evidence of such waiver may be given under an averment of performance.

¹ 11 Mo. 278.

THIS was an action of covenant, commenced in the St. Louis circuit court, on the 28th October, 1845, by the appellee against the appellant, on a policy of insurance to the amount of six thousand dollars, on manufactured tobacco, cut, chewing, and smoking tobacco, leaf tobacco, presses, screws, and fixtures, cutting-machine and fixtures, household furniture, shed and fixtures, against loss or damage by fire; the said articles being contained in a two story stone building, situate north of Biddle Street and near Roy's Tower, being the property of Peter Lindell, and occupied by the assured as a tobacco factory. The insurance was for one year, commencing 25th November, 1844, and ending 25th November, 1845, at noon. The loss or damage, if any, to be established according to the true and actual value of the property, at the time it should happen, and to be paid within sixty days after due notice and proof thereof made by the insured in conformity to the conditions annexed to the policy, and with the usual exceptions, losses by invasion, &c., and provisions against double insurance; which policy was declared to be made and accepted in reference to the time and conditions thereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties thereto, in all cases not otherwise specially provided for.

The terms and conditions referred to are those usual in fire policies, being twelve in number, the 9th, 10th, and 11th of which are material to be considered in the determination of the questions presented by the record. They are as follows: —

“IX. Persons sustaining loss or damage by fire shall first give notice thereof in writing to the company; and as soon after as possible, they shall deliver as particular an account of their loss and damage as the nature of the case will admit, signed by their own hands, and the same to be corroborated by the exhibit of the assured's books of account, and other vouchers in his power to furnish, whenever the same may be required. And they shall accompany the same with their own oath or affirmation, declaring the said account to be true and just; showing also what other insurances, if any, have been made on the same property; what was the whole value of the subject insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing

the subject insured, and the several parts, were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, as far as they know or believe. They shall also produce a certificate, under the hand and seal of the magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss, stating that he has examined the circumstances attending the fire, loss, or damage alleged, and that he is acquainted with the character and circumstances of the insured or claimant, and that he verily believes, that he, she, or they, have, by misfortune, and without fraud or evil practice, sustained loss or damage on the subject insured to the amount which the magistrate or notary public shall certify; and until such proof, declaration, and certificates are produced, the loss shall not be payable.

“X. All fraud or false swearing shall cause a forfeiture of all claims on the insurers, and shall be a full bar to all remedies against the insurer on the policy.

“XI. In case difference shall arise touching any loss or damage, it may be submitted to the judgment of arbitrators, indifferently chosen, whose award in writing shall be binding on the parties; and payment shall be made in sixty days after the loss shall have been ascertained and proved, without any deduction whatever.”

The first count of the declaration sets out the policy, with all the conditions annexed, and avers: 1st, the interest of the insured to the whole amount insured at the time of loss; 2d, that tobacco and other articles mentioned in the policy, being contained in the building described in the policy, were consumed and destroyed by fire on the 1st April, 1845, without invasion, &c., by which plaintiff sustained damage \$6,000; 3d, that plaintiff had made no other insurance; 4th, that the building was not used for any other purpose than that of a tobacco factory; 5th, that upon the happening of the said loss by fire, the plaintiff forthwith caused notice in writing of said loss to be given to the defendants; and 6th, that afterwards, on the 5th April, 1845, at the office of A. Carr, J. P., the defendants appeared, by their attorney, and the plaintiff also appeared, to make proofs of the loss of said goods, chattels, and property so insured, and the plaintiff then and there before said justice, did

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deliver as particular an account of his loss and damage by reason of said fire as the nature of the case would admit; which said account was then and there signed by the plaintiff, and the plaintiff accompanied the said account of loss with his oath, declaring the said account to be true and just, and showing that there was no other insurance on the said goods in the policy mentioned and insured thereby, and showing the value of the property insured, and in what manner the building containing the property insured was occupied, who were the occupants of said building, and where and how the fire originated, as far as the said plaintiff knew or believed; that the account and proofs were established by the oath of witnesses, and the said proofs, in presence of said attorney of said defendants, were reduced to writing in substance, and on the day and year aforesaid, at the place aforesaid, the said account of loss and the said proofs were delivered to the said defendants; 7th, that afterwards, to wit, on the 16th day of August, 1845, he (the plaintiff) did cause to be produced and delivered to the defendants a certificate, under the hand and seal of A. Carr, a magistrate, whose office was, at the time of said loss by fire, most contiguous to the place of said fire, and who was not concerned in said loss, stating that on the 5th April, 1845, he had heard the proofs of the loss of said goods and property in the plaintiff's tobacco factory, by fire, on the 1st April, 1845; that he had examined the circumstances attending the fire and loss alleged, to wit: the loss of said goods and property in the said tobacco factory, which were insured in the said St. Louis Insurance Company, for six thousand dollars, by policy dated 25th November, 1844, to which he referred; that he was acquainted with the circumstances and character of the plaintiff, the insured, and that he verily believed that the plaintiff, without fraud or evil practice, sustained loss and damage on the said goods and property insured, and specified in the said policy, to the amount of \$6,000; 8th, that more than sixty days after notice and proof of said loss and damage, the delivery of said certificate, he did demand and claim of the defendants the amount of the loss, and although the plaintiff had performed all things, &c., generally, the defendants did not pay, but refused, &c.

The second count is on the same policy, with the same averments, in substance, as the first. The defendants filed twenty-four pleas, all of which, except the 8th, 9th, 17th, 18th, 23d, and 24th, are to both counts. The 8th, 17th, and 23d, are to the first count, and the 9th, 18th, and 24th, to the second count. The plaintiff demurred to the 17th, 18th, 20th, 21st, 22d, and 24th pleas; the demurrer was overruled as to the 17th and 18th pleas, and sustained as to the residue. The 1st, 2d, 3d, 5th, 7th, 8th, 9th, 10th, 11th, 19th, and 22d, are denials of the averments in the declaration, in their order, to which the plaintiff formally joined issue and replied to each of 4th, 6th, 12th to 18th pleas inclusive.

The 1st plea is *non est factum*; the second and third deny the interest of the plaintiff in the property at the time of the loss; the fifth denies the loss as alleged; the seventh traverses in detail the averment of a compliance with the 9th condition of the policy; the eighth denies that plaintiff did deliver a particular account of his loss, &c., as the nature of the case would admit of, and accompany the same with his oath or affirmation showing whether any and what other insurance had been made on the property, in manner and form as in the first count alleged; the ninth is to the 2d count, in the same words as the 8th plea; the tenth denies that the plaintiff caused to be delivered to the defendant the certificate of Archibald Carr, to the effect and in the manner and form alleged; the eleventh denies that the plaintiff delivered to the defendant an account, on oath or affirmation, showing how the fire originated, so far as he knew or believed, in manner and form, &c.; the nineteenth denies the payment of premiums, and the twenty-second denies that the plaintiff did forthwith give notice of the loss, as averred.

The 4th plea alleges that the property mentioned in the policy was described by the plaintiff otherwise than the same really were, so that the same was insured at a lower premium than it ought to have been.

The 6th plea alleges that at the time of the loss, the buildings in which the property insured was were occupied in such way as to render the risk more hazardous than they were at the time of insurance.

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The 12th plea alleges that in the claims made by the plaintiff, there was fraud within the true intent and meaning of the 9th and 10th conditions of the policy; that is to say, in taking the quantity, nature, and value of the property, &c.

The 13th alleges that in the oaths and affidavits and each of them made by the plaintiff in support of the claim for loss, &c., there was false swearing, within the meaning of the 9th and 10th conditions of the policy, in this, that he swore that the affidavit showed when and how the said fire originated, as far as the plaintiff knew or believed, whereas the said affidavit did not show truly how said fire originated, as far as the plaintiff knew or believed.

The 14th avers the loss to have been occasioned by the careless negligence and improper conduct of the plaintiff.

The 15th charges that the fires were intentionally and fraudulently kindled, lit, &c., by the plaintiff.

The 16th charges that the fires were caused to be kindled, &c., by the plaintiff.

The 17th avers that when the building was burned, the tobacco was not in the building, as alleged in the first count. The 18th is the same to the second count.

The 20th plea alleges that the plaintiff did, since the making of the policy, and during the continuance thereof, appropriate, apply, and use the building specified for carrying on and exercising trade and business other than the business or vocation of a tobacco manufactory.

The 21st states that, after the making of the policy and during the continuance thereof, the plaintiff did use the said buildings and premises in the policy mentioned for the purpose of storing therein goods, chattels, and merchandise not of the kind and description insured.

The 23d is to the 1st count, and states that although the loss in that count mentioned happened on the 1st of April, yet the plaintiff did not give notice thereof until the 5th April 1845, although the office of the defendant was in the city of St. Louis, and the defendant might have given the notice at any time. The 24th plea is the same to the second count.

The replications traverse the averments in the 4th, 6th, 14th, 15th, and 16th pleas.

The replication to the 12th plea is, that the plaintiff did, as

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soon as possible after the loss, give to the defendant as particular an account of the said loss and damage as the nature of the case would admit, as alleged in the declaration, and that there was no fraud within the meaning of the 9th and 10th conditions in the claim made for said loss or damage, nor was there any fraud in taking the quantity, nature, or value of the said goods, in manner and form, &c.

To the 14th plea, the replication is, that in the oaths and affidavits, &c., in support of the claims, there was not false swearing, nor did the plaintiff, in swearing where and how the said fire originated, as far as he knew and believed, swear falsely, and the said oath and affidavit showed truly how said fire originated, so far as said plaintiff knew or believed.

The replications to the 17th and 18th pleas aver that the tobacco alleged to have been burnt up was, at the time of the execution of the policy, contained in the building described therein.

At the trial, the issues were found for the plaintiff and judgment rendered accordingly, from which this appeal is prosecuted.

At the trial, the plaintiff read in evidence the policy of insurance as set forth in the policy with the conditions therein referred to. 2d. A note signed by the plaintiff, bearing date the 5th of April, 1845, addressed to George K. McGunnege, President of the St. Louis Insurance Company, notifying him that a certain store-house, lately occupied by Robert Kyle, containing a stock of tobacco, presses, furniture, &c., situate, &c., was consumed by fire on the morning of the first instant, which building was insured at the office of the St. Louis Insurance Company, as per policy No. 1529, and dated 25th November, 1844, and that depositions are now being taken before Archibald Carr, Esq., at his office, St. Louis township. 3d. The application of the plaintiff for insurance, dated 25th of November, 1844. 4th. The survey of the premises, of same date. 5th. Proof of loss relied on as a compliance with the 9th condition of the policy, as follows:—

“State of Missouri, County of St. Louis, ss. Be it remembered that on this fifth day of April eighteen hundred and forty-five, before the undersigned, Archibald Carr, a justice of the peace, within and for the county aforesaid, came Robert Kyle who being by me duly sworn, on his oath deposeth and saith

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that on the first day of April, eighteen hundred and forty-five, about the hour of four o'clock in the morning, the two story stone building north of Biddle Street and near Roy's Tower, in the city of St. Louis, Missouri, containing the following stock of tobacco and fixtures, viz:

" 200 boxes fine manufactured tobacco, at \$25 per box	\$5,000 00
85 do. do. do. 20 " "	1,700 00
64 do. do. do. 10 " "	640 00
Cut chewing tobacco	200 00
Cut smoking tobacco	650 00
4 wooden presses, screws, and fixtures	800 00
2 hogsheads manufacturing tobacco	110 00
Cut and short tobacco and stems	250 00
4 patent iron presses, screws, and fixtures	900 00
1 cutting machine and fixtures	350 00
Paper and papering fixtures	75 00
Patent balances, iron clamps and flatteners	240 00
Shed and fixtures	250 00
Household furniture	300 00

were consumed; and this deponent says that it is not in his power to give a more particular description, for the reason that all of his books and accounts were consumed in the building aforesaid, and that the foregoing list of goods, and the value thereof, is true and correct. And the deponent further says that there was no other insurance on the said goods than that which was effected at office of the St. Louis Insurance Company; that he, the said deponent, was the sole occupant of the said building; that it was used as a tobacco factory only; that the said building was set on fire by some person or persons unknown to this deponent, in the wing of the west side of the said building, to the best of his knowledge and belief. The persons in the habit of sleeping in the said building were Robert McLarin and Thomas Day (white men), and Jack, Moses, Ben, Polly, Priscilla, and three or four children (negroes); that there was no cooking done in the said building, that said building was heated by a wood fire, made in a fire-place. The white men aforesaid were in the habit of sleeping in the west wing of said building, where the fire first took effect; and further deponent saith not.

Robert Kyle.

" Sworn to and subscribed before me this fifth day of April, 1845.

" Archibald Carr, Justice of the Peace."

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Annexed to the document are the affidavits of Robert McLarin and Thomas Day. Both state some of the circumstances of the fire. McLarin swears that the goods enumerated by Mr. Kyle were all in the house when it first took fire; that the value attached is correct, and that the goods were all consumed or damaged so as to render them of little or no value. He then refers to a list of articles saved in a damaged state.

The plaintiff also read in evidence a letter, signed by him, dated June 5, 1845, addressed to the Board of the President and Directors of the St. Louis Insurance Company, stating that on the 5th April he had furnished proof of the loss of his stock of tobacco, and demanding payment; also a copy of the record of the proceedings of the board of directors, by which it appears that the board, on the 5th May, by resolution, approved the action of the president in employing counsel to attend to the interests of the company in the charge made before Justice McKinney against Robert Kyle for arson. On the 5th June, the letter of the plaintiff of that date being before the board, it was resolved that the president be requested and directed to inform Robert Kyle that this company does not consider itself liable to said claim. The president accordingly informed the plaintiff, by letter of the same day, of the resolution of the board.

The plaintiff read in evidence two certificates of Archibald Carr, one dated the 5th of April, and the other the 15th August, 1845. The first does not, the second does, correspond with the averments in the declaration.

The president of the St. Louis Insurance Company was examined as a witness, produced the papers herein before mentioned (except the policy and notice of loss). He stated that on the evening of the 5th April Mr. Kyle delivered to him a notice, which he, witness, supposed was a notice to take depositions; he handed the notice to Mr. Crockett, and requested him to attend to it, and had not seen it since. That he, witness, did not receive the notice or proofs from Mr. Kyle, nor tell him that the notice was not sufficient; did not think that he made any objection to the proofs of loss taken before Justice Carr. When Mr. Kyle came to the office on the evening of

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the 5th with the notice, he, witness, complained of delay, and the plaintiff apologized; that witness had gone to the fire on the day the premises were burnt with two directors of the insurance company and a tobacco inspector, and examined the loss, and told servants of plaintiff to save some tobacco got out of the fire.

It appears from the evidence of Justice Carr that the plaintiff commenced taking his proofs on Friday, the 4th of April; that the affidavits or statements were written out and the oaths administered afterwards. The course adopted was to interrogate the witnesses, and collect the substance of their answers to be embodied in an affidavit; that the affidavits were partly written out on Friday and finished the next day in the evening, when Mr. Briggs, a partner of Mr. Crockett, appeared at the office.

It was proved that on the night of the 26th March, 1845, there was an attempt to burn the building, by setting fire at four or five different places in the attic story. Another attempt was made in like manner to fire the house on the night of the 31st of the same month, about midnight, which was discovered and arrested by extinguishing the fire at several places; but afterwards, at about two o'clock A. M. 1st April, it was discovered that fire had been set near the northwest corner of the building, which had advanced so far that it could not be arrested, and the building was consumed. Very little property was saved, and the greater part of that in a damaged state.

Robert McLarin, the principal witness for the plaintiff, testified that a day or two before the fire he counted the boxes of manufactured tobacco and other property in the house, and, according to his statement, every article mentioned in the account signed and sworn to by the plaintiff was then in the building. He also testified to the value of the tobacco of different kinds, as stated in that account, and that the presses and cutting machine cost the sum stated by Kyle as the value, as appeared by bills shown to him by Kyle; but he neither stated the value, nor gave such description of the other articles as to enable the jury to ascertain the value.

Thomas Day, the only other white man in the building, was examined by the defendant. He testified to the circumstances

attending the discovery and extinguishment of the fire on the 26th March, and the first on the night of the 31st March, as also the discovery of the fire which consumed the building. The two witnesses corroborated each other in their statements, except in unimportant details, in all respects, except those which related to the discovery of the person by whom the fires were set the first time on the night of the 31st March. Day, according to the testimony of both witnesses, on the alarm being given, jumped up, seized his gun, and without putting on his clothes ran out to the back porch of the building, while McLarin remained in the room to put on his clothes and make a light. Day states, that while he was at or near the door he discovered a person endeavoring to escape, within a few feet of him; that he snapped his gun at him twice without knowing who it was, but at the instant of snapping a second time, the light of a candle, lit by McLarin, reflecting on the door at which he stood, he discovered the person to be the plaintiff. He testified to conversations held with McLarin afterwards about the discovery, and in this he is contradicted by McLarin.

Other evidence was given tending to show that the plaintiff was at his residence at the time he was stated by Day to have been seen by him. Circumstances were also testified to tending to impeach the credit of Day, and others tending to support it. The evidence of McLarin was also impeached by facts and circumstances proved at the trial. A great number of witnesses were examined, who testified to facts tending to prove that there could not have been in the building at the time of the fire more than a third of the quantity of manufactured tobacco testified to by Kyle. Several of these were at the fire and looked into the basement of the building where the tobacco was stated to be stored, and express the belief that there was less than half the number of boxes stated in the account of Kyle; others, and a very large number, both tobacconists and others, who had witnessed the burning of buildings containing manufactured tobacco, where the fire was greatly more intense than at the building in question, testified to facts tending to prove that manufactured tobacco in boxes could not have been entirely consumed by the fire; they express their opinion, founded on experience, that the tobacco would not have been burned

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more than one or two inches into the mass, except where it had been broken by falling timbers or other external forces. It appeared that what remained after the fire did not exceed in quantity what would be in the opinion of the witnesses the remains of from seventy-five to a hundred boxes. Not one of the witnesses who saw the remains of the tobacco at the fire in question, thought it possible that there could have been more than one hundred and fifty boxes of manufactured tobacco in the building.

One witness on the part of the plaintiff testified that at the late fire, where a building occupied by him was burned, he was of opinion that some manufactured tobacco in boxes had been entirely consumed. He supposed from what he heard from a clerk of his, that there were 100 boxes in the building, and the remains would not weigh more than thirty. At the same time he showed, on cross-examination, that there could not have been sixty boxes in the building, and how much had been carried away before he saw the remains, he could not tell. What he saw, was what remained some ten days after the fire.

Other witnesses were examined touching the value of the presses, both wooden and iron, the cutting-machine, shed, &c., and their testimony showed that the several articles could not be worth, when new, more than one half the amount sworn to by the plaintiff.

It was proved by McLarin, that the plaintiff kept his books at his dwelling, and the only book of any sort kept at the factory was kept by McLarin himself, and that was a sort of miscellaneous blotter, in which, however, but few entries were made, and those having no relation to the purchase or sale of tobacco, and furnishing no means by which the stock on hand could be ascertained, nor even an entry affording any information which could be of service in ascertaining the loss or damage, or what articles were on hand before the fire.

After the close of the evidence, the court gave the jury the following nine instructions:—

“1. The condition annexed to the policy requiring notice of loss to be given forthwith, only requires such notice to be given with due and reasonable diligence under all the circumstances of the case.

"2. If the jury believe from the evidence, that at the time the plaintiff gave notice of his loss under the policy read in evidence, the St. Louis Insurance Company made no objection to receiving it, or did not object because the same was not given in time, and if said company, after the notice was given, employed counsel to attend, and who did attend to the taking the proof of the loss in question; if these facts appear from the evidence, they amount to a waiver on the part of the insurance company of any objection or defect in said notice, or as to the time it was given, if any such objection or defect existed.

"3. The condition of the policy requires that the notice and proofs of loss are to be construed strictly against the St. Louis Insurance Company, in this action; and if the jury believe from the evidence that the said company made no objection to the notice or proofs of loss, but refused to pay the loss on other and different grounds, the jury is authorized to find that such objections were waived.

"4. If the insurance company intended to rely on any defect in the proofs of loss, they should have apprised the plaintiff that the proofs were defective, so as to give him an opportunity to supply the defects before it was too late; and if the jury believe from the evidence that they neglected or omitted to apprise the plaintiff that his proofs of loss were defective, their silence is to be considered as a waiver of any defect in the proofs.

"5. By the term '*false swearing*,' as used in the conditions of the policy, is meant an attempt to defraud the company by swearing intentionally and with bad motives, to the existence of property which the insured has never lost, or by greatly overcharging the property which had been destroyed, or by not acknowledging that which had been saved, or the statement of any material and substantive facts, or the omission to state material facts in the knowledge of the assured, with intent to defraud or mislead the assurers.

"6. Mistakes in the description of articles destroyed, if not intentional or designed to mislead or defraud the other party, are not material, and do not make out the charge of false swearing or fraud.

"7. As to the estimate of the value of the articles mentioned in the plaintiff's proofs of loss, the rule of law is, that the over-

valuation (in order to ground a defence to the recovery on the property and defeat the plaintiff's action) must be made by the plaintiff fraudulently, and with a design to deceive the defendants. An over-estimate of some articles, if made innocently and mistakenly, without fraudulent intent, is no bar to the plaintiff's recovery of the actual loss which he sustained by the fire.

"8. Under the issue joined on the 15th and 16th pleas, the jury must be satisfied beyond all reasonable doubt that the plaintiff set fire, or caused the same to be set, to the building and property destroyed, before they can find issues for the defendant; and unless the jury believe from the evidence that the plaintiff did set fire or cause fire to be set to the building and property destroyed, they must find the issues under the 15th and 16th pleas for the plaintiff.

"9. If the finding of the jury should be for the plaintiff, the measure of damage is, the value of the property destroyed, not exceeding \$6,000, with interest at the rate of 6 per cent. from the time payment was demanded, after the lapse of sixty days after the loss."

Exceptions were taken to these instructions by the defendants.

The defendants asked sixteen instructions. The court gave the third, fifth, ninth, and fourteenth, which are as follows:—

"3. Unless the plaintiff did, before the commencement of this suit, deliver to the defendant a particular account of the articles lost or damaged by the alleged fire, signed with his own hand, accompanied by his oath or affirmation declaring the said account to be true and just, showing also whether any and what other insurance had been made on the same property, what was the whole value of the subject insured, in what general manner (as to the trade, manufacture, merchandise, or otherwise) the buildings containing the subject insured and the several parts thereof were occupied at the time of the alleged loss, and who were the occupants of said building, and when and how the fire originated, the jury ought to find for the defendants the issue on the 8th and 9th pleas.

"5. In determining the question whether the account and statement given in the evidence is a compliance with the con-

ditions of the policy, the jury is to consider only the account and statement sworn to by the plaintiff, and no defects therein can be supplied by the affidavits of Robert McLarin and Thomas Day. The said affidavits are not, nor is either of them, evidence of any fact therein stated.

“9. The affidavits of McLarin and Day, taken before Justice Carr, the testimony of the same witnesses and of Ezekiel Day, taken before Justice McKinney, are not, nor is either of them, evidence in this case of any fact therein stated, and they are excluded from the consideration of the jury, for every purpose except that of deciding on the credibility of the persons respectively by whom they were made.

“14. If the jury find from the evidence, that at the time of making the affidavit of the plaintiff, and read in evidence, he knew by whom said building was set on fire, then he was guilty of false swearing within the meaning of the 10th condition of the policy.”

It appears from the bill of exceptions that the 10th, 13th, and 15th instructions by the defendant were given with modifications by the court; but it does not appear whether the alterations were of a formal or substantial character. The instructions as copied on the record are as follows:—

“10. Unless the jury find from the evidence, that the account and statement sworn to, and given in evidence by the plaintiff, exhibit a particular account of the articles lost or destroyed by the alleged fire, and also show what was the whole value of the subject insured, or that the plaintiff had it not in his power to give a more particular account of said property, the issue on the 8th and 9th pleas ought to be found for the defendants.

“13. If the jury find from the evidence that the plaintiff, in the affidavit sworn to and read in evidence, did not state truly, as far as he knew, at the time of making said affidavit, when and how said fire originated, then he was guilty of false swearing within the meaning of the 10th condition of the policy.

“15. If the plaintiff has wilfully and untruly stated any fact in the account and statement exhibited by him, or has been guilty of any misrepresentation or concealment with intent to deceive or defraud the defendants, touching the number, quality, quantity, or value of the articles lost or destroyed by the alleged

fire, or in the building at the time it was consumed, or the loss of his books, or any other matter required to be shown by the 9th condition of the policy, he is guilty of fraud within the meaning of the 10th condition of the policy."

The remaining instructions were refused as prayed, and exceptions were taken to the refusal of those numbered 1, 2, 4, 6, 7, 8, 11, 12. They are as follows:—

"1. Unless the jury find from the evidence, that the plaintiff did as soon as practicable after the alleged loss give notice in writing thereof to the defendants, then he has not complied with the 9th condition of the policy, and the issue on the 7th and 22d pleas ought to be found for the defendants.

• "2. If the jury find from the evidence that the plaintiff was at the time of the alleged loss in the city of St. Louis, and an inhabitant thereof, and had knowledge of said loss early in the morning of the 1st of April, 1845, that the defendants then and ever since kept their office and place of business in the said city, that the same was open for the transaction of business each day, that no notice in writing of said loss was offered or delivered to the defendants, nor to any of their officers or agents, until the evening of the 5th of April, 1845, then the jury ought to find for the defendants on the issues joined on the 7th and 22d pleas of the defendants, unless the jury find that the plaintiff was prevented from delivering said notice at an earlier time without fault or negligence on his part.

"4. If the jury find that the paper given in evidence as signed and sworn to by the plaintiff, does not exhibit both a particular account of the articles lost or damaged, and what was the whole value of the subject insured, it is not a compliance with the 9th condition of the policy, and the issues joined on the 8th and 9th pleas ought to be found for the defendants.

"6th. The account and statements of the plaintiff read in evidence, although sworn to by him and delivered to the defendants, is not a compliance with the 9th condition of the policy, and the issues on the 8th and 9th pleas ought to be found for the defendants.

"7. If the jury find that the account and statement sworn to by the plaintiff and exhibited in evidence, does not contain as

particular an account of the articles lost or damaged by the alleged fire, as the nature of the case admitted, and also what was the whole value of the subject insured, the issue on the 8th and 9th pleas ought to be found for the defendants.

"8. It devolves on the plaintiff to prove that the account sworn to and given in evidence by him is as particular an account of the articles lost or damaged by the alleged fire as the nature of the case would admit; that the articles mentioned in said account were contained in the building described at the time of the alleged fire; that all of his books and accounts were consumed in said building; that the list of goods in said account and the value thereof is true and correct; that the plaintiff was the sole occupant of said building, and that it was used as a tobacco factory only at the time of said alleged fire; and the affidavits of Robert McLarin and Thomas Day are not evidence of any of said facts so to be proved.

"11. Unless the jury find from the evidence that the account and affidavits sworn to and given in evidence by the plaintiff exhibit a true account of the articles lost or damaged by the fire and the value thereof, or that he could not furnish a more correct account, and had good reason to believe that the said account was correct, then the jury ought further to find the plaintiff guilty of false swearing, within the meaning of the 10th condition of the policy.

"12. Unless the jury find from the evidence that all the books and accounts of the plaintiff were consumed by the alleged fire, or that the plaintiff had good reason to believe that said books and accounts were so consumed, they ought to find that the plaintiff is guilty of false swearing."

After verdict, the defendants moved for a new trial, assigning as reasons, that the verdict was contrary to law and contrary to evidence, that the court misdirected the jury, and refused to give proper instructions. This motion was overruled and exceptions taken.

Geyer, for appellant.

Eager & Hill, for appellee.

NAPTON, J., delivered the opinion of the court. For the sake of convenience I will consider the question presented by the record under three principal heads: first, the sufficiency of the

notice; second, the proofs of loss; and third, the instructions on the questions of false swearing and the plaintiff's participation in the arson.

The declaration averred that notice in writing was *forthwith* given to the company, according to the stipulations in the 9th condition of the policy. The proof was, that the fire occurred on the 1st of April, and the notice was given on the *fifth*. The first instruction of the court was, that the notice must be given with due and reasonable diligence under all the circumstances of the case. The acts required to be performed by the assured are well understood to be conditions precedent, without the performance of which the plaintiff cannot recover. An averment of the performance is necessary, and the proof must of course sustain the averment. What, then, is meant by the word *forthwith*, as used in the 9th condition of the printed proposals? It cannot mean, that no interval is to elapse between the time of the fire and the giving of the notice; nor can it mean that an unreasonable or unnecessary delay would be tolerated. The construction given to this term in *Inman v. Western F. I. Co.* 12 Wendell, 452, appears to be a reasonable one, and differs in no respect material from the doctrine advanced in the first instruction. *Forthwith* means without unnecessary delay. The notice must be given with *due diligence under the circumstances of the case*. The averment in the declaration, that notice was given *forthwith*, is therefore equivalent to an averment that the notice was given *with due diligence under the circumstances of the case*; and it was only necessary that the proofs should sustain the averment. There is no material difference between the instruction as given by the court and the first instruction asked by the defendant. They were both erroneous in leaving to the jury the question of due diligence; but had the issue been found under either or both of these instructions, this error would not have been prejudicial to the judgment, if the facts on the record would authorize the finding.

But the court did not question, in this position, but declared to the jury in the second instruction, that if the company made no objection to receiving the notice, or did not object to it because it was not given in time, and employed counsel to attend

to the taking of the proofs of the loss, these facts amounted to a waiver, on the part of the company, of any objection to the notice, either to its form, or the time it was given. This instruction, it is manifest, absolved the jury altogether from the necessity of determining upon the question, as to the diligence of the plaintiff. The first instruction was therefore rendered a mere abstraction; for, if the company received the notice and acted upon it, the second instruction rendered unnecessary all inquiry into the diligence of the plaintiff in giving it. The court extended the doctrine of waiver which has been applied to the sufficiency of the preliminary proofs to the notice. There is no doubt abundance of authority to sustain the doctrine, that formal defects in the proofs of the loss may be waived by the conduct of the underwriters. The doctrine is reasonable in itself, and necessary to protect the assured against mere technical obstructions to a recovery, in other respects just and proper. If the formal proofs of interest and loss are defective, it is but fair that the company should apprise the assured of their objections. Such defects might be cured, if the party was apprised of them. It would therefore be a virtual deception practised on the assured, if the underwriters should be permitted to receive these papers without objection, and after placing their objections to paying the insurance upon other grounds, turn round at the trial, and attempt to avoid their liabilities by technical objections to the proofs furnished them. But the want of a timely notice is another matter. Whether the company are silent, or make objections, cannot alter the rights of the parties. If the notice is too late, there is an end to the matter. The want of such a notice cannot be supplied. Of what avail would it be to the assured to be told that the notice was insufficient? that it was too late? How could the silence of the insurance company be construed as an admission that the notice was in time? It was not the duty of the company to make any formal objection to the want of notice. It was made the duty of the assured to give the notice, and neither silence on the part of the company, nor positive objections, would alter its character or sufficiency.

In the case of *McMasters & Bruce v. The Westchester Ins. Co.* 25 Wend. 379, the judge submitted to the jury two questions:

first, whether there had been an unreasonable delay in giving the notice; and second, whether the insurance company had by their acts waived the preliminary proof. In that case the fire occurred on the 1st of July and the notice was not given until the 13th; but it appeared that negotiations had been on foot between the two parties from the time of the fire. The question of delay was not confounded with the waiver of preliminary proofs. The jury passed upon both questions, and although the question of diligence was considered one of law, when the facts were found or agreed upon, yet the appellate court regarded the verdict of the jury under such instructions as special, and proceeded to determine the case accordingly.

I am not willing to say that the notice in this case was not in time. The delay was so inconsiderable that very slight circumstances would be sufficient to excuse it. Courts have uniformly given a liberal construction to these conditions in policies of insurance. It would be going too far to say that a notice given in four days after the fire would, under any circumstances, constitute a notice *forthwith*, within the meaning of the 9th condition. There were, however, facts in evidence which might have satisfactorily accounted for the delay in this case. The plaintiff received an injury, either at the fire, about which the present controversy has arisen, or some other fire happening at that time, and was confined for several days to his house. This circumstance alone might make the delay a reasonable one, and the fact that the company acted under the notice, would be evidence that it had been productive of no inconvenience or injury to them. But the jury did not pass upon the facts, on this view of the case. The court told the jury that the silence or failure to object was an absolute waiver of defects in the notice, both as to time and form. Upon this construction of the law, a failure to give notice for six months would not affect the rights of the assured, unless the underwriters should positively refuse to receive the notice or take some other unequivocal steps to indicate their determination to resist the payment on this ground. Such a doctrine would be in fact implying a new contract between the parties, from the mere inaction or silence of one party.

2. The third and fourth instructions, so far as they related to

Proof of Loss. — Forthwith. — Waiver.

defects in the proofs of the loss, were correct. Formal defects in the preliminary proofs, which may be supplied, if objections are made by the underwriters in time, may well be regarded as waived where the underwriters put their refusal to pay distinctly on some other ground. Nor do I perceive any objection to such evidence on the ground that the pleadings involve a different issue. It is merely evidence of a performance. It is not the case of a substitution of a new contract for the old one; it is not an excuse for non-performance, by the prevention or discharge of the defendants; but it is evidence of performance. The party for whose benefit the condition is inserted is presumed to understand its import, and his acceptance is the strongest evidence that the act agreed to be done has been done according to contract.

In the numerous cases cited, in which this doctrine of waiver has been distinctly asserted, I do not discover that any objection has been suggested to the admissibility of such evidence on account of the form of the pleadings and the character of the issues made. It is true, that the actions are usually assumpsit, and the cases tried on the general issue, but an averment of the performance of a condition precedent is as essential in the action of assumpsit as in covenant.

In the case of *McMasters v. Westchester M. I. Co.*, heretofore cited, the pleadings are not stated, but it is to be inferred that the declaration was in the usual form, and the judge left it with the jury to say whether the acts of the underwriters had not waived any objections to defects in the preliminary proof. In the case of *Ælva Fire Ins. Co. v. Tyler*¹ (in the court of errors of New York), the chancellor declared the law to be well settled, that defects in the proofs of loss might be waived by the silence of the underwriters, but suggested that the question of waiver had not been submitted to the jury. "The difficulty is," he observed in the course of his remarks on the point, "that the question of waiver was not raised at the circuit, so as to give the underwriters an opportunity of showing that they had in fact insisted upon the want of a proper certificate as a necessary part of the preliminary proofs; the court having decided that the certificate produced was sufficient."

¹ 16 Wend. 385.

The objection of the chancellor was, not to any defects in the declaration, excluding proof of waiver, but that the circuit judge held the certificate sufficient, and never permitted the jury to pass upon the question of waiver. It is clearly inferrible that, in his opinion, no averment of waiver in the declaration was necessary or would have been proper. In the case of *Dawes v. North River Ins. Co.* 7 Cow. R. 462, the plaintiff averred a performance of the 9th condition of the policy, and the proof was that the president of the company waived a compliance. The court held, that the president had no authority to do such an act. By the act of incorporation, the president had no such power, and no such power had been given by any by-law. The company therefore were not considered bound. It was admitted, however, that if the board of directors had dispensed with the condition, the corporation would have been bound. Now, it is obvious that the investigation of the question of authority was totally unnecessary, if, under the pleadings, a waiver of any sort was inadmissible. The case of *Martin v. Fishing Ins. Co.* 20 Pick. 389, is another case tending very strongly to show the opinion of the profession on this point. That was an action of assumpsit on a policy. No preliminary proof was made, except an abandonment, which was not accepted, and a demand of payment of the loss, and a written agreement of reference, and the testimony of one of the plaintiff's witnesses that the defendant had always resisted the right of recovery on account of the unseaworthiness of the vessel. The supreme court said, "The court very properly left it to the jury to determine, whether the defendants had not waived their right to any further proof, or whether it was not evidence that they had such proof."

In these cases, the allegations in the declaration are not stated, but it is to be presumed, that if there had been any variation from the usual form, that fact would have appeared. The evidence of a waiver was uniformly admitted under the general issue in assumpsit, and the declaration in this special action on the case must necessarily contain the same averments which would be essential in an action of covenant brought upon a similar instrument under seal.

3. The principal defence in this case was based upon the alleged false swearing of the plaintiff, in his preliminary proofs

of loss, and his alleged participation in the burning of his factory. To sustain the latter charge, it was obviously essential that the first should be established. For it would require a stretch of credulity, not ordinarily to be found, to be convinced that the plaintiff set fire to a building containing nearly twelve thousand dollars' worth of his property, when the insurance only covered six thousand dollars. The main controversy, then, must have been as to the truth of the plaintiff's statements of the amount and value of the property in the building at the time of the fire, and his statement that he was unable to give a more particular description, for the reason that all his books and accounts were consumed in the building. Accordingly we find on the record, that a mass of testimony was brought to bear upon both these points. It was proper that the instructions upon these points should be clear and satisfactory. The instructions given, at the plaintiff's instance, on the question of false swearing, have already been copied; their propriety is not questioned. The only objection that could be urged to them is, perhaps, that they are too abstract in their character, and do not, with sufficient precision, direct the jury to the exact matters controverted. But the instructions asked by the defendants were also given. It is stated that they were modified, but to what extent does not appear. We must presume that the alterations were immaterial. The 12th instruction asked by the defendants was refused. That instruction directed the jury to find the plaintiff guilty of false swearing, if they believed from the evidence that all the plaintiff's books and accounts were not consumed in the alleged fire, or that the plaintiff had no reason to believe that such was the fact. The plaintiff, in his proofs of loss, to which he made oath, stated that he could not give a more particular description of the property consumed, for the reason that all his books and accounts were consumed in the fire. The plaintiff may have intended to assert that all his books and accounts, which at the time of the fire were in the factory, had been consumed, and therefore no moral guilt could attach to this statement, nor any fraud be perpetrated on the company, if the statement was substantially true, although some of the plaintiff's books and accounts, kept at another place, were not consumed. Still, it is obvious, that the state-

ment of the plaintiff carries with it the implication that the books and accounts which had been consumed in the fire had a tendency to explain the amount of property contained in the building; and if they had no such tendency, the statement was calculated to create a false impression. There was evidence on both sides of the question, of which the jury were the judges. The 12th instruction, as it was asked, was objectionable; it might have been given with the modification we have suggested.

The instruction in relation to interest was erroneous. The insurance was not payable until sixty days after notice and proof of loss.

The case must be remanded because of the error committed by the court on the question of notice. The facts have not been passed upon by the jury in such a shape as to enable us to determine, as a question of law, whether there was due diligence or not. We have not ventured to form, much less express, any opinion of the case upon its merits. We have had time barely to glance over the voluminous mass of testimony spread upon the record. The case is an important one, not only because of the considerable amount of property involved, but because it involves imputations upon the integrity of the plaintiff of the most serious character. If the imputations be unfounded, the plaintiff will lose nothing by delay; for truth, though sometimes slow in its progress, rarely fails to overtake error in the long run. If they are true, it is but right that the insurance company should have another opportunity of establishing them, there having been a misdirection at the former trial.

The other judges concurring, the judgment is reversed, and the cause remanded.

Concealment. — Mortgage.

DELAHAY vs. MEMPHIS INSURANCE COMPANY.¹

(Supreme Court, Tennessee, April Term, 1848.)

Concealment. — Mortgage.

A failure on the part of the assured to disclose the existence of a mortgage on the property, is not a circumstance material to the risk, and will not avoid the policy.

IN this case a verdict and judgment were rendered in favor of the defendant in the commercial and criminal court at Memphis; King, J., presiding. The plaintiff appealed.

McClanahan, Barry & Delafield, for the plaintiff.

E. M. Yerger, for the defendant.

GREEN, J., delivered the opinion of the court. This is an action of covenant on a policy of insurance.

On the trial a mortgage, executed by the plaintiff to secure a debt due by him to the mortgagee, and in full force at the date of the policy, was given in evidence by the defendant. The plaintiff did not disclose to the underwriters the existence of the mortgage when he made his application for insurance. The court charged the jury, among other things, "that they must inquire if, at the time of insurance, there was any incumbrance or mortgage on the property insured, and whether plaintiff had informed defendant of the same. If a mortgage or trust deed, or other incumbrance did exist, which the plaintiff did not communicate to defendant, it was such a concealment as would have rendered the policy void." The jury found for the defendant, and the plaintiff moved for a new trial, which was refused, and he prosecuted this appeal in error.

We think his honor erred in the instruction to the jury. A mortgage or deed of trust is only a security for the debt, and if the property be destroyed the debt remains, so that the assured has as much interest in protecting the property as if there were no incumbrance on it. It may be that, practically, some bad men might be willing that property insured by them, on which was an incumbrance, should be destroyed, intending to act dishonestly with the creditor, and to pocket the insurance money; but we cannot make the assumption that such

¹ 8 Humph. 684.

Warranty. — Leasehold Interest. — Amount of Recovery. — Profits.

would be the case, and establish it as a rule of decision. The case of *Strong v. The Manufacturing Insurance Company*, 10 Pick. R. 40, is referred to in the case of *Catron v. Insurance Company*, 6 Humph. R. 176,¹ and the principle there adjudged is recognized. Upon reviewing those cases, we reaffirm the principle, that a failure on the part of the assured to disclose the existence of a mortgage on the property is not a circumstance material to the risk, and will not avoid the policy.

The judgment must be reversed, and the cause remanded for another trial.

It does not appear from this case that any inquiry was made concerning incumbrances. If such had been made, and an untrue answer had been given, the policy must have been avoided. *Davenport v. New England Ins. Co.* 6 Cush. 340 (1850); *Hayward v. New England Ins. Co.* 10 Cush. 444 (1852); *Brown v. People's Mut. Ins. Co.* 11 Cush. 280 (1853); *Packard v. Agawam Ins. Co.* 2 Gray, 334 (1854); *Bowditch Mut. Ins. Co. v. Winslow*, 3 Gray, 415 (1855); *S. C.* 8 Gray, 38 (1857); *Battles v. York County Ins. Co.* 41 Maine, 208 (1856); *Hutchins v. Cleveland Ins. Co.* 11 Ohio St. 477 (1860); *Towne v. Fitchburg Mut. Ins. Co.* 7 Allen, 51 (1863); *Jacobs v. Eagle Mut. Ins. Co.* Ib. 132 (1863); *Smith v. Columbia Ins. Co.* 17 Penn. St. 253 (1851); *Lowell v. Middlesex Mut. Ins. Co.* 8 Cush. 127 (1851).

In *Towne v. Fitchburg Mut. Ins. Co.*, *supra*, the court say that it "has often

been held in this class of cases [that] the substantial misstatement of a fact which the insurer has made essential by a precise interrogatory, in the absence of anything which qualifies or limits the obligation to answer correctly, avoids the policy without an express stipulation to that effect." But see *Protection Ins. Co. v. Harmer*, 2 Ohio St. 452 (1853). See also *Howard Ins. Co. v. Bruner*, 23 Penn. St. 50 (1854); *Dutton v. New England Ins. Co.* 29 N. H. 153 (1854); *Richardson v. Maine Ins. Co.* 46 Maine, 394 (1859); *Edmonds v. Mutual Safety Ins. Co.* 1 Allen, 311 (1861); *Hawkes v. Dodge County Ins. Co.* 11 Wis. 188 (1860); *Patten v. Merchants' & Fire Ins. Co.* 40 N. H. 375 (1860); *Gahagan v. Union Ins. Co.* 43 N. H. 176 (1861); *Murphy v. People's Ins. Co.* 7 Allen, 239 (1863); *Pennsylvania Ins. Co. v. Gottsman*, 43 Penn. St. 151 (1864).

NIBLO vs. THE NORTH AMERICAN FIRE INSURANCE COMPANY.²

(Superior Court, New York City, April Term, 1848.)

Warranty. — Leasehold Interest. — Amount of Recovery. — Profits.

If the assured describes the property in his application as "his buildings," this is not a warranty, nor is it material, and proof that he is tenant for a year will satisfy the description.

Such tenant has an insurable interest in the property, but he can recover, in case of loss, only the value of the tenement for occupation for the unexpired part of the term. He

¹ *Ante*, p. 427.

² 1 Sand. 551.

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cannot recover for the destruction or interruption of his business, nor for the loss of gains and profits, however certain, unless they are expressly insured. Profits must be insured as such.

THE case is sufficiently stated in the opinion.

D. Lord, for the plaintiff.

C. Livingston & J. P. Hale, for the defendants.

By the Court, SANDFORD, J. We are not prepared to assent to the defendants' proposition, that the description of the buildings in the policy as his is equivalent to a warranty on the part of the plaintiff, that he was the owner of the tenements, nor that it was a material misrepresentation of the fact. And certainly there is no evidence of any concealment of material facts on his part, or of any intended fraud upon the insurers.

In the usual course of business, application is made for insurance on a building specified, without any statement of the nature or extent of the applicant's interest. If the insurers desire information on that point they can ask for it, and it must be given to them truly, if given at all. If no inquiry be made, or statement given, and on the happening of a loss it appear that the assured had no interest in the subject matter, he cannot recover. And if he have a qualified property or interest, his recovery will be restricted accordingly.

We assent fully to the principle that a misrepresentation of a fact, material to the risk insured, will defeat the policy, but we think it is not applicable to the facts before us. And we do not believe that our construction of those facts will open the door for fraudulent insurance by tenants and occupants, as was suggested on the argument. Insurers against fire write upon the surveys of their own agents, or upon the written applications of the assured. They take into consideration the character of the applicant in acting upon the latter, and by inquiry can always supply every omitted fact material to the risk. And insuring upon their own examination, or upon a written statement available to them as a representation or a warranty, they need incur no hazard from frauds except such as are necessarily incident to the business of insurance. In *Fowler v. The Ætna Fire Insurance Company*, 6 Cowen, 673, to which we were referred, the description of the building was material in respect of the risk and the amount of the premium. On the other

hand, in *Fletcher v. The Commonwealth Insurance Company*, 18 Pick. 419, the supreme court of Massachusetts decided, that a party who insured "his store," in language like that used in the case at bar, was not bound to state to the insurers that the store was built upon the land of another, and was to be removed on six months' notice.

It is not denied that a tenant for a year may insure his interest in the demised tenement; and there being neither fraud nor warranty in this case, the plaintiff is entitled to recover the loss against which he was insured.

The vital question in the cause is, what was the loss? The plaintiff claims first, that having a legal insurable interest in the buildings as lessee, he is entitled to recover their value as fixed by the policy. The case of *Laurent v. The Chatham Fire Insurance Company*, 1 Hall's R. 41, in this court, which was cited by the plaintiff, does not sustain his position. There the assured owned the building entire. The landlord had no interest whatever in the property insured. In this case, the buildings were the exclusive property of Van Rensselaer's devisees, and the interest of the assured was merely his right to possess and occupy them for the unexpired portion of the year for which they were demised.

In fire insurance generally, there is nothing corresponding with the valued policies used in marine insurance, and the assured recover according to their actual loss, as established in evidence. 2 Phill. on Ins. 40, 53. We perceive no reason for distinguishing this case from the general rule. On the contrary, it would be extravagant and dangerous to hold that the lessee of a house for a year can recover its entire value on a destruction by fire upon a policy insuring it for its value. How it would be if the insurers were fully apprised of the extent of his interest when they insured the policy, we are not called upon to decide.

Next, it is claimed by the plaintiff, that if the extent of his interest be open to inquiry for the purpose of reducing its value, it is proper to look into the circumstances which increased the value of the property to him. And in this view, he offered the testimony which was excluded at the trial. It is said that the evidence was not to show remote, uncertain, or contingent

profits, but to prove bargains actually made and which were certain to produce gains to the extent of the insurance, by the use of tenements to the end of the term, if the buildings endured to that time.

The point urged is plausible; but it is not to be disguised that it leads to the admission of proof of gains and profits, interrupted and cut off, in every case where the tenement insured is occupied for business purposes, and the injury to the building itself, or to the interest of the assured therein, is less than the sum insured.

We have no hesitation in saying, that on an insurance against loss or damage by fire on a building simply, and its injury or destruction by the peril insured against, the insured cannot recover for his loss occasioned by the interruption or destruction of his business carried on in such building, nor for any gains or profits which were morally certain to enure to him, if it had remained uninjured to the expiration of his policy.

It is undoubtedly true that profits may be insured; but they must be insured *as such*; so that the underwriters may know with what subject they are dealing. See 1 Phill. on Ins. 122, 191. This policy is upon certain buildings. It agrees to make good to the assured such loss or damage as shall happen by fire *to the property specified*; not the damage which shall happen to the plaintiff by reason of the interruption of his business, nor to the gains which he would make in those buildings if they remained unharmed. The policy prescribes that the loss shall be estimated according to the true and actual cash value of *the property insured*, at the time of the fire (limited of course by the extent of the interest of the assured); and in the proof of loss, the assured is to make oath of the cash value of the subject insured. Thus, besides its silence as to everything aside from the buildings as such, the policy is inconsistent with the supposition that anything else is insured. And finally, the tenth condition annexed, giving to the insurers the option to repair or rebuild, is irreconcilable with the plaintiff's claim for damages growing out of the interrupted use and enjoyment of the premises.

Our conclusions from the good sense of the contract are sustained by a decision of the king's bench, in England, and by

the opinion of this court pronounced in the first year of its existence.

In *Wright v. Sun Fire Office*, 3 Nev. & Mann. 819; S. C. 1 Ad. & Ell. 621, the policy insured £1,000, "on his interest only in the Ship Inn and offices." The premises being injured by fire, the insurers reinstated them pursuant to the policy. The assured then claimed to recover for the rent paid in the mean time, the hire of other houses, &c., while the inn was being repaired, and the loss or damage sustained by him by reason of various persons declining to go to the Ship Inn while it was undergoing such repairs. The cause was submitted under a rule of court, who awarded to the assured £450, for the loss he had sustained in his business as an inn-keeper by not being able to occupy the inn and offices during the interval between the fire and the rebuilding of the premises. On a rule *nisi*, to set aside the award, it was contended by the assured that the interest which he had in the inn consisted in the power to use it in his business as an inn-keeper, and the loss by temporary inability to use the inn was within the meaning of the policy; and the loss of business by reason of his not being able to use the premises would be equally within the policy. That the profits from the use of the inn were an insurable interest, and the nature of the interest of the assured in the subject matter may be left at large, if the subject be properly described.

The court held that the policy did not cover the profits of the business, or the loss sustained in his business, by the assured being unable to occupy the premises; and that profits, when insurable, must be insured as profits, and are not recoverable as an incidental loss under the insurance of a building.

In *Laurent v. The Chatham Fire Insurance Company*, before cited, the defendants had insured \$800 on a building which was destroyed by fire. On the trial, they proved that the plaintiff was the lessee of the land on which the building stood, and although he had erected it himself, and was entitled to remove it at the end of his term, the lease had only seventeen days to run when the fire occurred. The value of the building as it stood was \$1,000, but if it were necessary to remove it from the lot demised, it was not worth for that purpose more than \$200; The court decided that its value as it stood was the measure of

damages, and not any estimate of what it might prove to be worth to the assured under the circumstances in which he was placed. Thus holding in favor of the assured, the converse of the proposition for which the plaintiff in this case contended. The argument of Chief Justice Jones, in the case of *Laurent*, is elaborate and satisfactory to show that as it is the tenement upon which the insurance is made, so the actual value of the tenement, as a building, is the loss of the assured on its destruction by fire ; that however unproductive the property may be, or however great may be the extent of the revenue derived from it, the measure of indemnity in case of loss is simply its value as a building.

The New York fire cases to which we were cited, 17 Wend. 285, and 18 Ib. 126, were constructions of a statute, in regard to compensation for private property destroyed in the exercise of a great public duty, by a municipal corporation. We do not deem them applicable, either in their facts or the principles upon which they turned, to the construction of the contract between these parties.

The testimony offered at the trial was, therefore, properly excluded.

The plaintiff, in conclusion, insisted on a return of the premiums paid from the outset, if it were held that he had no insurable interest in the buildings. As to this, we have already declared our opinion, that he had an insurable interest as tenant ; and that being so, there can be no return of premium.

There is nothing before us by which we can adjust the extent of his interest covered by the policy ; and there must be a new trial to ascertain the same, unless the parties will agree upon some amount to be taken as the verdict of a jury, assessing his damages for such value. On the principle we have established, there can be no allowance for the loss of his business or his interrupted gains ; but merely for the value of the tenements for occupation, subject to the rent. One mode of putting the inquiry to the jury would be this : How much would a stranger, having no contracts or engagements pending, such as the plaintiff offered to prove, have given for the unexpired lease when the fire occurred ? There may be other modes of stating the inquiry, equally proper, but we will not attempt

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to anticipate them. We recommend the parties to agree, in order to save the expense of another trial.

New trial ordered, nisi, &c.

It is said in a note to this case by the original reporter that the defendants took exceptions to the decision; but no subsequent report of the case appears.

The following case is important in this connection : —

MUTUAL ASSURANCE COMPANY, appellants, vs. MAHON, appellee.¹

(Court of Appeals, Virginia, November Term, 1805.)

A leasehold tenement is not insurable by the Mutual Assurance Company, unless, at least, the nature of the title be described.

But if such insurance be invalid, the insured may, in the absence of fraud, recover back his premium paid.

MAHON filed a bill in the superior court of chancery stating that he leased an unimproved lot of land in Norfolk, of Marsden, at £30 per annum, for ten years; and was to be at liberty to remove the houses he might erect on it. That this kind of lease is usual in Norfolk; and that the plaintiff had built a dwelling-house and kitchen on the premises, which he insured in the defendants' office, but the same were accidentally burnt; that the defendants refused to pay the sum insured, and therefore the bill prayed a decree for payment, and general relief.

The answer admitted that the houses were insured; but denied notice of the lease; and insisted that no other than fee simple tenements are insurable in their office.

The lease was proved by two witnesses, and recorded in due time. *

The court of chancery decreed payment of the sum insured, with interest; and the defendants appealed to the court of appeals.

Wickham, for the appellants. It is uniformly true that a concealment of facts, or suppression of circumstances, avoids the contract; and it makes no difference whether the concealment, or suppression, arose from inadvertence or design. 1 Marsh. Ins. 347. A mere wager insur-

ance would not have been good at common law. 2 Marsh. Ins. 684; and it is clear that the insured must have the unqualified property in goods. But this is plainly a wager policy; for the lease may be worth nothing, and consequently the right to remove the house will make no difference, especially as the expense attending the removal would often exceed the value of the house. 2 Marsh. Ins. 706. It is necessary, for the safety of the company, that the insured should be the owner; for otherwise, it would be for his interest that the house should be burnt, and the insurers would consequently be more liable to losses from various causes.

Call & Hay, contra. The insurance in this case is not repugnant to the principles of the institution; for the act of incorporation says: "that the citizens may insure their buildings," &c., without distinguishing between freehold and leasehold estates; and a contrary construction would defeat the object of the law, which was that all proprietors of houses should partake of the benefits of it. The company could receive members upon what terms they pleased; and one of their regulations was that leasehold interests might be insured. The tenant was the real owner, as he had every right in the lease which an owner can have; and it was the

¹ 5 Call, 517.

building only, and not the land, which was insured; so that the society had the security which they asked, and therefore ought to be bound by their contract; for the only object of quantity in the estate would be to afford security; and if they had such as was satisfactory, there could be no necessity for a freehold. Besides, the valuation might have been less on account of the lease, and consequently the risk diminished. It was not a wagering policy; because the tenant, as before observed, had a real interest, and the materials, after the loss, belonged to the company. There was no misrepresentation; for the lease was recorded, and the society did not profess to insure none but freehold houses.

Randolph, in reply. The insured had but a leasehold interest, and the policy is for the full value in fee. It is not proved that the society were in the habit of granting insurances on leasehold estates; and the materials would be no indemnity for the risk. Not only the houses, but the land on which they stand, too, were to be pledged; and therefore without a fee in the owner, the security was defeated. The appellee did not disclose the interest, and the record was not notice; but, without notice, the policy was void, as both parties ought to be acquainted with the situation of things at the time of the contract. *Burns*, Ins. 70. The appellee was only entitled to a return of premium and quotas; but at most to a *pro rata* compensation.

Lyons, President, delivered the resolution of the court as follows:—

The court is of the opinion, that, in bargains and contracts of every kind, a full, fair, and correct representation of all material facts, matters, and circumstances respecting the article or thing about which parties are bargaining, and all the qualities of, and concerning it, ought to be clearly stated and fully understood; good conscience dictating, and good faith requiring, that no material truth should be suppressed, or falsehood suggested: which principles are the governing rules of decision in courts of equity, where contracts founded on fraud or acci-

dent, or induced by misrepresentation or concealment, even by mistake, without the design of either party, are declared to be null and rendered void, as contrary to good faith and true conscience.

That the appellee having only a temporary estate and interest for a term of years in the land whereon the house insured by him stood, as stated in the proceedings of this cause, and not having disclosed his true title and real interest in the said land, fully and fairly in the declaration he made of it to the appellants at the time they insured the said house, as he ought to have done, his case comes within the above rule respecting concealment or misrepresentation; and whether done by design, or mistake, renders his contract with the insurers null and void; especially, as, by the constitution, rules, and regulations of the society, formed by the insurers in this case, the assurance was mutual, and the insured bound to pay a share, according to the sum insured, of all losses sustained by any of the insurers and partners in the insurance company; and the property of each person so insured being bound for such payment, ought to be as permanent as the property of the others to answer such losses; or if not so permanent, should, at least, be known to the company before insurance thereof made; and that, therefore, the appellee, under all the circumstances of this case, is not entitled to recover the money claimed by him in his bill filed in this cause, for the value of the house insured by him, which was burnt down; but as no fraud appears to have been contemplated by him, and the insurance might have been made and done through the mistake or misrepresentation of both parties, this court is of the opinion that all money paid or advanced by the appellee to the appellants or their agents, for premiums and quotas on account of his insuring the said house, should be repaid to him with interest, and that the parties ought to bear their own costs in the said court of chancery: Therefore it is decreed and ordered that the decree aforesaid be reversed and annulled, and that the appellee pay to the appellants their

Limitation Clause. — Validity of.

costs by them expended in the prosecution of their appeal aforesaid here.

And it is ordered, that this cause be remanded to the said court of chancery,

for an account to be taken and a decree be entered according to the opinion and principles of this decree.

SCOTT CRAY, Receiver, &c. vs. THE HARTFORD FIRE INSURANCE COMPANY.¹ In equity.

(Circuit Court of United States, Connecticut, April Term, 1848.)

Limitation Clause. — Validity of.

A policy of insurance provided that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action should accrue; and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up. *Held*, that a plea setting up such provision and the lapse of time specified, in bar of an action on the policy, was a conclusive answer to the suit.

THIS was a bill in equity to recover the amount of a policy of insurance. The defendants pleaded in bar the following clause in the policy: "14. It is expressly provided that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustained in any court of law or chancery, unless said suit or action shall be commenced within the term of twelve months next after the cause of action shall accrue; and in case any such suit or action shall be commenced against said company after the expiration, &c., the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." The plea averred that the suit was not commenced within twelve months next after the cause of action accrued.

Roger S. Baldwin, for the plaintiff.

Isaac Toucey & Thos. C. Perkins, for the defendants.

NELSON, J. 1. The fourteenth condition of the policy, providing that no action should be sustained against the company founded thereon, unless brought within the term of twelve months after the cause of action shall have accrued, affords, in our judgment, a conclusive answer to the bill of complaint.

¹ 1 Blatchf. 280.

The bringing of the suit within this period is made a condition subsequent to the right of the insured to recover the loss. The policy was entered into and the risk assumed with express reference to this, among other conditions; all which must, therefore, be regarded in expounding the rights and obligations of the parties under the contract. It stands upon the footing of the other conditions to be found therein; such as giving notice of the loss, delivering a particular account of the same, properly verified, producing books of accounts, &c. It is not against law, nor repugnant, nor impossible, and it may be very material to the rights and interests of the party in whose favor it is made.

We have been referred to no statute or principle of the common law forbidding such a condition. Originally, there was no limitation to actions. *Blackmore v. Tidderley*, 2 Ld. Raym. 1099; *The People v. Gilbert*, 18 John. 228; *Perham v. Raynal*, 2 Bing. 306; *Wilk. on Lim. 2, et seq.* The act of 21 Jac. 1, 1623, the first general statute on the subject, provided that suits should be brought within six years after the cause of action had accrued, and not after. But there is nothing in this act forbidding a limitation short of this period, by the stipulation of the parties. It only prohibits the suit after the six years. The common law gave to the party an indefinite time to bring an action. The act simply limited the time to the given period.

There might be some force in the argument that an agreement to extend the time beyond the statutory limit was against law and void, but there is none as respects a limitation short of it. Even in the former case it has been held, notwithstanding the positive terms of the act, namely, that suits should be brought within six years, *and not after*, that the benefit of the provision may be waived by the act of the parties. *Wilk. on Lim. 52, 53*, and cases there cited. This may be done during the running of the statute, or after the limitation has attached. Why not, then, by a stipulation in the contract itself? And why may not the limitation be restrained in the same way?

We cannot doubt that, before the statute of 21 Jac. 1, it was competent for the parties, by a clause in their contract, to limit the time within which, in case of a breach, an action should be brought. As the period was then indefinite, there could be no

limit, unless it was thus fixed. There is nothing in the act, necessarily or by fair construction, taking away this right.

The case of an agreement to refer to arbitration is not analogous. That is deemed inoperative on the ground of an attempt to oust the jurisdiction of the courts. *Kill v. Hollister*, 1 Wils. 129; *Halfhide v. Fenning*, 2 Bro. C. C. 336; *Watson on Arb.* 4, 7, 8. And even that case was at first a matter of contradictory decision. The same may be said of the case referred to of an agreement that a distress for a rent-charge shall be irrepleviable. It is an attempt to take away all remedy for a right that is regarded as incident to the distress, and inseparable from it. *Co. Litt.* 145 *b*, and 282 *b*; *Brac. lib.* 4, p. 233 *a* and *b*. These observations are also applicable to the case of an agreement that a mortgage shall be irredeemable.

In the case before us there is no attempt to oust the jurisdiction of the courts or to take from the party his appropriate remedy. The condition simply requires vigilance in the pursuit of the remedy, beyond the requirements of the law. The jurisdiction of the court to administer justice in the given case is not interfered with.

But the true ground, we are inclined to think, upon which the clause rests and is maintainable, is, that by the contract of the parties, the right to indemnity in case of loss, and the liability of the company therefor, do not become absolute, unless the remedy is sought within the year. The stipulation goes to the right as well as to the remedy. Indeed the time within which the remedy is to be enforced is prescribed, for the purpose of reaching and regulating the rights of the insured under the contract. Although the condition is subsequent, it is, if lawful, as operative and binding as a condition precedent; and that it is lawful, as well as a very essential part of the contract, we cannot doubt.

The clause contemplates a loss about which a controversy may arise between the insured and the company, and in respect to which the right to indemnity may be denied. The object was not to foreclose it and prevent a resort to the proper tribunal, but to compel a speedy resort, and a termination of the controversy, while the facts were fresh in the recollection of the parties and witnesses, and the proofs accessible.

Assignment. — Authority of Secretary. — Alienation. — Mortgage.

While it is not perceived to be at all injurious to the rights of the insured, it is manifestly beneficial to the company, who stand on the defensive and are obliged to await the movements of the adversary party.

We are of opinion, therefore, that the plea is a good answer to the bill.

After this decision the bill was amended, and no receiver having been appointed by setting out reasons for the delay in his place, the case proceeded no further. See note to *Williams v. Vermont Ins. Co.*, ante, p. 629.

CONOVER vs. THE MUTUAL INSURANCE COMPANY OF ALBANY.¹

(Court of Appeals, New York, April Term, 1848.)

Assignment. — Authority of Secretary. — Alienation. — Mortgage.

The authority of the secretary of an insurance company to consent to an assignment for the company will be presumed in the absence of proof to the contrary. And even if evidence of his authority were necessary, proof that he had often done this without objection would be sufficient.

A mortgage held not an alienation within the statute for mutual insurance companies. Where the assured has mortgaged the property insured and assigned the policy, before loss, to the mortgagee, suit upon the same should still be brought in the name of the party originally insured.

ASSUMPSIT tried at the Albany circuit in April, 1845, before Parker, C. J. The action was on a policy dated July 22, 1836, by which the defendants insured the plaintiff for five years, against loss or damage by fire, to the amount of \$600 on his dwelling-house, No. 34 Van Schaack Street, in the city of Albany, and \$66 on his wood-house in the rear of the dwelling. The policy contained the following clause: "The interest of the insured in this policy is not assignable unless by consent of the company manifested in writing, in pursuance of the by-laws of the company, and the same to be indorsed on, or annexed to this policy." On the 16th of May, 1837, the plaintiff wished to borrow \$500 from one Robert Gridley, and proposed to secure him by a mortgage on the insured property, and an

¹ 1 Comst. 290.

assignment of the policy. Gridley was willing to loan the money on those terms, if the defendants would consent to an assignment of the policy. The parties called and informed the secretary of the company of their arrangement for the loan, and the secretary thereupon indorsed and signed a consent that the policy be assigned to Gridley. The plaintiff and Gridley thereupon concluded the proposed arrangement, and on the same day the policy was assigned to Gridley. Evidence was given that the secretary had before often consented to the assignment of policies; but there was no by-law or written resolution of the company giving him authority to do so.

On the 18th of August, 1838, the property was destroyed by fire. The affidavit which was furnished as a part of the preliminary proofs was made by Gridley, and stated, among other things, the assignment of the policy from the plaintiff to Gridley. The averment in the declaration concerning the affidavit was, that "the said plaintiff did deliver unto the said company an affidavit signed with his own hand, and verified by his own oath, taken before," &c. The defendants made an objection for variance, which the judge overruled, and the defendants excepted.

The defendants moved for a nonsuit on the ground, 1. That there was no proof that the secretary had authority to consent to the assignment. 2. By the charter, the company itself could not consent to the assignment without a compliance with the seventh section of the charter; and there was no proof of a compliance. And 3. The action should have been brought in the name of Gridley. Motion overruled; exception; and verdict for the plaintiff. The defendants move for a new trial on a bill of exceptions.

R. W. Peckham, for plaintiffs in error.

M. T. Reynolds, for defendant in error.

JOHNSON, J. Whether there was a variance between the declaration and proof is not material to inquire, as it was at most only such an one as the circuit judge might properly disregard on the trial, and upon which no bill of exceptions will lie. *Mann v. Herkimer Ins. Co.* 4 Hill, 187; *Mappa v. Pease*, 15 Wend. 669.

The more material inquiry in this case is whether the consent

to the assignment by the secretary, Joice, to enable the plaintiff to procure a loan by a mortgage upon the insured property was binding upon the company. For if that is not so, there is an end to this suit. The facts are briefly that the agent or attorney of Gridley, the party in interest, called at the company's office upon Joice, the secretary, the person regularly in attendance there to transact their business, and stated to him that Gridley proposed to loan to the plaintiff, Conover, \$500, and take a mortgage upon the insured property, provided he could obtain the consent of the company to the assignment of the policy as security. That to enable the parties to carry out their arrangement, the secretary indorsed the consent upon the policy. Whereupon the \$500 were advanced, and the mortgage and assignment executed. Joice testifies that he was in the habit frequently of giving consent to the assignment of policies for the same purpose, and always supposed he was authorized to do so by the by-laws or some resolution of the directors; though on looking into the by-laws and minutes, as it would seem for the first time, on the trial, for some evidence of such authority, he was unable to find it, and thence concluded none such had been given. It further appeared on the trial that the policy of the president of the company had also been assigned to secure the payment of a mortgage upon his property given after the insurance, and that the consent was indorsed upon it in the same manner as the one in question. Also upon producing the book of policies where memorandums are entered of such as have been assigned, the consent in every instance was found to have been indorsed by the secretary, Joice. Most of this evidence was objected to as improper. But I think it was properly admitted, for the purpose of showing not only who was intrusted with the company's business, but the manner in which transactions of this character had been uniformly conducted.

Some evidence was introduced on the part of the defendant below to show that these acts of their secretary were never brought to the knowledge of the board of directors, or received their formal ratification. And it is insisted that inasmuch as the board never, by any formal act, gave their sanction, and the by-laws required the consent in writing of the directors to any conditional alienation by mortgage subsequent to the insurance,

the consent in this case was unauthorized and void. I cannot subscribe to this doctrine. The directors were bound to know the uniform course pursued by their sole agent in the transaction of their business at their office, especially where regular entries of his acts were made in their books, and they must be held responsible on the ground of a tacit assent and approval, unless they can show that by a strict vigilance and scrutiny into his acts they were unable to ascertain the course he was pursuing, and could not therefore arrest it or put the public upon their guard. It is enough, it seems to me, that here the party in interest went to the sole place where the business of the company was transacted, and procured what was intended on all hands to be, and I think in effect was, an assent to the execution of the mortgage, as well as the assignment of the policy from one of the principal officers having the sole charge of the business, and that too in the same form as it had been frequently done there. *Bank of Vergennes v. Warren*, 7 Hill 91.

Incorporated companies whose business is necessarily conducted altogether by agents, should be required at their peril to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually and as a part of their system of business transcend those powers. How else are third persons to deal with them with any degree of safety? They can have no access to the by-laws and resolutions of the board, and no means of judging in the particular instance whether the officer is or is not within the prescribed limits.

All that Gridley can be supposed to have known in the case before us would be derived from the face of the policy. There he would only learn that the interest of the insured therein was not assignable without the consent of the company manifested in writing, in pursuance of the by-laws, and indorsed upon the policy. He accordingly repairs to the office where he had a right to suppose he could have the consent manifested and indorsed in the proper form. It is done according to the system and in the form adopted and uniformly pursued there by an officer having charge of the business, and who supposed this peculiarly within his province. In the faith that all is right, he advances his money and receives his mortgage and assign-

ment. No objection is made to this or numerous similar transactions, and even after the fire, payment is refused upon an entirely different ground. Clearly, as it seems to me, the company are not now at liberty to dispute or deny the authority of their secretary to indorse the consent in question. The objection that the execution of the mortgage avoided the policy was not distinctly made on the trial. But had it been made there as distinctly as it is here it could have been of no avail, as it sufficiently appears that the only object the company could have in giving the consent was to enable Conover to borrow money by a mortgage upon the insured property.

Nor are we called upon to decide whether the absolute alienation by Conover after the assignment of the policy is a good defence, as the point was not raised upon the trial. But if we were, I do not see how the interest of Gridley, the assignee, could be affected by it. *Traders' Ins. Co. v. Roberts*, 9 Wend. 404. The judgment, I think, should be affirmed.

GRAY, J. One ground of the motion for a nonsuit made on the trial was, that there was no proof that the secretary of the company had authority to consent to the assignment of the policy of insurance. On this point I cannot entertain a doubt that the evidence was pertinent and sufficient to carry the cause to the jury, and the jury having found in favor of the existence of the authority, their verdict is conclusive as to this branch of the case.

It was insisted, on the part of the plaintiffs in error, that the mortgage given by the defendant in error to Gridley was an alienation of the property insured within the meaning of the seventh section of the act according to which this company was incorporated (Stat. 1836, p. 44, § 7), and therefore that it avoided the policy. The language is, "Whenever any property insured with this corporation shall be alienated by sale or otherwise, the policy shall thereupon be void," &c. The legislature without doubt used the word in the ordinary sense which belongs to it, and it seems to me quite clear that it does not embrace a mortgage which creates but a lien or security, and does not transfer the title.

Nor did the policy become void by reason of the thirteenth by-law of the company, requiring, when a mortgage is given

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by the insured, that he shall make a written representation thereof to the company. It may fairly be presumed from the evidence in the case, and the jury have so found, that this requirement was complied with, or that it was dispensed with by the authority of the company.

If the giving of the mortgage by the insured had been an alienation of the property within the seventh section of the act, the action would have to be brought in the name of the assignee of the policy; but as the case was not within that section, the suit was properly brought in the name of Conover. *Jessel v. Williamsburgh Ins. Co.* 3 Hill, 88; *Mann v. Herkimer Ins. Co.* 4 Hill, 187.

I see no error in the judgment, and am of opinion that the same should be affirmed.

Judgment affirmed.

The following is the opinion of the court below:¹ —

By the Court, BRONSON, C. J.: The circuit judge had a discretion to disregard the variance as amendable, and for the exercise of that discretion a bill of exceptions will not lie. 2 R. S. 406, § 79; *Mappa v. Pease*, 15 Wend. 669; *Mann v. Herkimer Mutual Ins. Co.* 4 Hill, 187.

There was sufficient evidence to carry the cause to the jury on the question of authority in the secretary to consent to the assignment of the policy. Although he had no written authority, he had often given consent in other cases, and the jury could not but have found, upon the evidence, that what he did had been approved by the company. And besides, it was enough that the secretary was a principal officer or agent of the company, and that he gave the consent on application for that purpose, at the place where the company transacted its business. His authority should be presumed until the contrary appears. *Bank of Vergennes v. Warren*, 7 Hill, 91. If the case of *Dawes v. The North River Ins. Co.* 7 Cowen, 462,

must be considered as laying down a different doctrine, we feel constrained to say that the decision cannot be supported.

The defendants insist that the mortgage to Gridley was an alienation of the insured property within the meaning of the seventh section of the charter of the company. Statutes of 1836, p. 315, and 44. But we think otherwise. The alienation spoken of in the statute is an absolute transfer of the title to the property. The mortgage only created a lien on the land for the security of a debt.

If the case had been within the seventh section of the charter, the action should have been brought in the name of Gridley. *Mann v. The Herkimer Ins. Co.* 4 Hill, 187. But as the case was not within that section, the action was necessarily brought in the name of Conover, though for the benefit of Gridley. *Jessel v. The Williamsburgh Ins. Co.* 3 Hill, 88.

There was no error on the trial.

New trial denied.

See also *Slocum v. Fairchild*, 7 Hill, 292.

¹ 3 Denio, 254 (1846).

Alienation. — Mortgage. — Conditional Sale.

JEREMIAH TITTEMORE vs. THE VERMONT MUTUAL FIRE INSURANCE COMPANY.¹

(Supreme Court, Vermont, April Term, 1848.)

Alienation. — Mortgage. — Conditional Sale.

Under the twelfth section of the statute incorporating the Vermont Mutual Fire Insurance Company, which provides that, when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void, a sale of the premises, with a mortgage taken back to secure the payment of the purchase money, is to be treated as an alienation avoiding the policy, even though it be provided that the mortgagee shall retain the possession until the purchase money is paid.

But where the holder of the policy executed a warranty deed of the premises, and at the same time received back a deed of the same premises, with a condition annexed, that if the grantor in that deed should pay to the grantee the sum of \$2,000 within three years, and should allow the grantee in that deed to retain possession of the premises until that sum should be paid, then the second deed should be void, otherwise in force, and it appeared that the grantor in the second deed never, in any form, agreed to pay the sum mentioned, but it was wholly optional with him whether to do so or not, it was *held*, that this amounted merely to a conditional sale, and was not such an alienation as would avoid the policy.

And it was also *held*, that the two deeds being executed at the same time, constituted parts of an entire contract, and were to receive the same construction as if the condition contained in the second deed had been inserted in the first deed.

ASSUMPSIT upon a policy of insurance. Plea, the general issue, and trial by jury, November term, 1847. Redfield, J., presiding.

On trial the plaintiff gave in evidence the policy declared upon, which was dated August 6, 1842, and insured to the plaintiff the sum of \$1,200 upon his house and shed, represented unincumbered, and other property connected therewith, for the term of six years. The policy was made subject to the provisions of the statute incorporating the company, and by the tenth section of that statute it was provided, that the policy should be binding in all cases where the assured has a title in fee simple, unincumbered, to the building or buildings insured, and to the land covered by the same; but that, if the assured have a less estate therein, or if the premises be incumbered, the policy shall be void, unless the true title of the assured and the incumbrance of the premises be expressed therein, and in the application therefor; and by the twelfth section of the same

¹ 20 Vt. 546.

statute it was provided, that when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to be cancelled; provided that the grantee, or alienee, might have the policy transferred to him, by complying with certain forms and conditions. The plaintiff's loss by fire happened in March, 1846. The only questions made in the case were in reference to an alleged alienation of the insured premises by the plaintiff.

A deed from the plaintiff to Philip Van D'Waters, dated January 28, 1842, and conveying the insured premises in the common form of a deed with warranty, was given in evidence. Also, a deed from Philip Van D'Waters to the plaintiff, bearing the same date, and conveying the same premises, which was also in the common form of a deed with warranty, with this condition annexed: "*Provided*, nevertheless, if I, the said Philip Van D'Waters, my heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, to the said Jeremiah Tittlemore, his heirs, executors, or assigns, the sum of \$2,000 in three years from date, and allow the said Jeremiah Tittlemore to hold the peaceable possession until said sum is fully paid, then this deed to be void, otherwise to be and remain in full force and effect." Also, the deposition of Philip Van D'Waters, who testified that the two deeds were executed at the same time, and as part of the same transaction, and that he did not become bound to pay to the plaintiff the sum expressed in the proviso to the second deed, or any other sum, or promise to pay the same, otherwise than by said proviso, and that he never did pay any part thereof, and that he never made any other agreement with the plaintiff respecting the land than is expressed in the second deed and proviso. Also, the deposition of Benjamin Peake, who testified that the two deeds were executed on the same day, but at different hours, the first in the morning and the second in the afternoon, and that he took the acknowledgment of both as justice of the peace.

The court charged the jury, that they might regard both deeds as one transaction if they were so intended by the parties, and that, in that state of facts, there was no alienation within the meaning of the act of incorporation, if they believed all the testimony in regard to the transaction.

Verdict for plaintiff. Exception by defendants.

Smalley, for plaintiff.

O. H. Smith & C. W. Prentiss, for defendants.

The opinion of the court was delivered by

DAVIS, J. The plaintiff, it is not doubted, had, at the time this policy of insurance was effected, a fee simple unincumbered estate in the house and shed, for the destruction of which by fire this action was brought, as also in the land on which they stood, so that the contract assumed legal validity in the outset, in accordance with the intentions of the parties, and in pursuance of the provisions of the tenth section of the statute incorporating the company. The policy covered a period of six years from its date, which was August 6, 1842; and in March, 1846, the buildings, together with a quantity of personal property comprised in the policy, were destroyed by fire, of which seasonable notice was given to the proper officers. The defendants declined to settle and adjust this loss, and now resist a recovery solely on the ground of the conveyance by the plaintiff to Van D'Waters of the insured premises in January, 1843, and the reconveyance from the latter to the former of the same date.

These, it is insisted, constituted an alienation of the property within the true intent and meaning of the twelfth section of the statute, which provides that, when any house, or building, shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors to be cancelled. The plaintiff does not claim exemption from the just consequences of the transaction, whatever they are, by reason of the proviso to the section referred to, which contemplates a transfer to the grantee of all legal rights under the contract upon compliance with certain conditions and formalities, none of which were observed in the present instance.

The main effort on the part of the defendants' counsel has been to show that the reconveyance from Van D'Waters, though of the same date as the deed to him, had not the effect of revesting the fee of the land in Tittlemore, but was a mortgage conveyance, in usual form, intended to secure the payment of the purchase money; and that, though not paid by the time limited, yet an equitable estate remained in the mortgagor,

until a decree of foreclosure should put an end to it. Assuming this to be correct, they infer that an alienation by sale took place, and that, *ipso facto*, by the very terms of the statute, which is to be taken and deemed a part of the contract, being expressly referred to, the policy became void; and that even if the strict principles of the ancient law were to be applied to this case without the modifications which courts of equity have introduced into the law of mortgages, and the plaintiff by the lapse of three years, without the payment of the \$2,000, were to be considered as restored to his full and absolute dominion over the premises, before the destruction thereof, the liability of the corporation would not thereby be revived.

I am not disposed to controvert this last proposition. Upon a clear and distinct alienation being made, though no actual surrender of the policy to be cancelled may have followed, I am inclined to think the contract ceases to have any binding force, so that a repurchase of the premises before loss would have no effect in restoring vitality to it.

The question then recurs, Was here an alienation by sale? It was undoubtedly such, if an alienation at all. There is nothing to bring the case within the operation of any other mode of alienation.

There can be no question that the deed from Tittlemore to Van D'Waters, taken by itself, imports a sale. It is a regular warranty deed of lot No. 109, in Highgate, on which it is admitted the buildings in question were situated, conveying the title in fee. But simultaneously with this conveyance is a reconveyance in the same form, with a proviso or condition annexed thereto, that if the grantor should, within three years from that time, pay or cause to be paid to the grantee \$2,000, and allow the latter to hold the peaceable possession in the mean time, then the deed was to be void.

So far as the deeds are concerned, the transaction is in the usual form of a sale of real estate, with an express lien upon the property to secure the payment of the money. But in one important particular it departs from the usual form, that is, in omitting the execution of any note, or bond, or other written evidence of the indebtedness created by the sale. There was not, in the present case, it seems, even a verbal agreement to pay

the \$2,000. There is nothing from which we can infer an indebtedness on the part of Van D'Waters, which would impose a personal duty, or subject him to a personal remedy for the payment, unless it be implied from the word "pay" used in the clause of defeasance. That phrase, however, is equally appropriate to describe the completion of a contract of purchase left wholly optional with the purchaser as where it is otherwise.

A doubt has been suggested whether, if this could be comprehended in the class of ordinary sales, with mortgage security for payment, it necessarily follows that, until payment is made, or, at any rate, until payment falls due, it should be regarded as an alienation within the meaning of the act of incorporation.

Were we to apply merely the ancient legal principles of a mortgage to the case, there would be certainly plausibility in holding that the fee of the land remained all the time in the plaintiff, — that at most an inchoate contingent interest was created, which, on payment of the stipulated price by the time limited, would, by virtue of the original conveyance, ripen into a perfect title. But mortgages, when any independent indebtedness exists, — for I have no doubt a mortgage may exist without any such indebtedness, — have long been here, as everywhere, regarded as a pledge of real estate as security for the debt. The legal title, for most purposes, even after condition broken, is treated as still in the mortgagor, until a final foreclosure.

Nor would the circumstances that, in this case, a clause was inserted, allowing to the mortgagee possession of the premises, to which, without such a clause, he would not be entitled until default of payment, affect the question now under consideration, as the right to immediate possession, unless prevented by statute or express agreement, belongs to the mortgagee. Looking at the matter in the point of light in which it is viewed by the courts, by the community, and it is to be presumed by the legislature, I should have had no difficulty in saying that, if this transaction be not plainly distinguished from the ordinary one of a sale upon a credit of three years, with the usual lien upon the premises as security for ultimate payment, it ought to be regarded as an alienation, and consequently a forfeiture of all right of action under the policy of insurance.

But we are satisfied that this cannot be fairly ranged under

the head of mortgages. Taken in connection with the depositions of Van D'Waters and Peake, it is evident that no obligation existed, on the part of the former, to pay the \$2,000, which could be enforced by suit. It was wholly optional with him, whether to pay it, and thus perfect his title to the property, or omit to do so, in which case all things would remain as before any contract was made. The absence of any express stipulation to pay, together with the renunciation of all rights to the possession until the title should be acquired by actual payment, are, in our opinion, decisive indications that the parties intended a conditional sale.

Both instruments being executed simultaneously may well be regarded as constituting one entire contract, to be construed precisely as it would be were a similar condition inserted in the deed from Tittlemore to Van D'Waters. In one case the payment of the money would constitute a condition precedent, without which no title would pass; in the other, the reconveyance is perfect in form, subject only to be rendered inoperative by a condition subsequent. It is a mere matter of formal arrangement. In substance there is no difference.

The case of *Porter v. Nelson*, 4 N. H. 130, is much in point. In that case a conveyance was made for the purpose of effecting a sale of the farm by the efforts of the grantee, and, to secure the owner, the grantee reconveyed immediately, with a condition that the reconveyance should be of no effect in case the original grantee paid the sum of \$2,000, it being understood by the parties, that any excess above that sum for which the farm might be sold should be retained by the grantee for his trouble. This, in form, was a mortgage, and exactly the form adopted here; but it was held not to be a mortgage in fact. The case was a stronger one than the present, inasmuch as both plaintiff and defendant (the latter was not the grantee but an assignee of the grantor) had treated the reconveyance as a mortgage. The case of *Page v. Foster*, 7 N. H. 392, is similar in principle; where, whether a mortgage or not is made to depend on the inquiry, whether a debt existed for which the party had a remedy independent of the conveyance.

The case of *Stetson v. Mass. Mutual Fire Ins. Co.* 4 Mass. 330, fully recognizes the propriety of considering successive

deeds, and other legal instruments, as part of one entire contract, for the purpose of carrying into effect the true intention of the parties. The defendants there set up in defence, that the plaintiff had conveyed a moiety of the insured premises in fee, reserving a term of seven years to one Harris, averring that the trustees of the company on that account had declared the policy void. By the replication it appears that Harris immediately reconveyed to the plaintiff in mortgage, to secure an acknowledged debt, and thereupon the plaintiff demised to Harris and another person the premises for seven years, reserving rent. The whole was regarded as a conditional sale after the expiration of seven years. The court, it is true, thought that neither under the rules of the company, which differed essentially from the clause under which the question arises here, nor by virtue of the common law principle which denies to the insured a right to recover, if the property insured have been alienated before loss, was the plaintiff's right to recover affected. I infer from the reasons and grounds of the decision, as stated by Judge Sewall, that, had there been there, as there subsequently was (*Jackson v. Mass. Mut. F. Ins. Co.* 23 Pick. 418), a rule or by-law, almost literally like the clause now in question, it would have interposed no objection to a recovery for the whole loss.

The case of *Bigelow v. Kinney*, 3 Vt. 353, affords an example in this court of construing a deed of conveyance and a mortgage back as constituting parts of one contract, when contemporaneous, so that one party, an infant, could not be allowed to affirm one instrument and disaffirm the other. Later authorities go somewhat farther, and dispense with absolute identity of time, in the assertion of this principle. *Lovering v. Fogg*, 18 Pick. 540.

As we construe this contract, then, as no part of the \$2,000 was paid or tendered, within the time limited, whatever prospective conditional interest Van D'Waters ever had in the premises had ceased, before the destruction of the property, and the fee of the land never having been out of the plaintiff, — for I do not regard a conveyance and reconveyance, when simultaneous, as divesting him of title at all, — there was no alienation, which, by the terms of the statute, could vitiate the policy.

Upon the views herein indicated, with respect to the true

Pleading. — Warranty.

character of this transaction, it will hardly be pretended, that a mere contingent interest, a naked right to purchase and appropriate the property on payment of a certain sum by a given time, unaccompanied by possession, or any right to the possession, in the mean time, presents a case within this clause of the statute. It has been determined, both in New York and Massachusetts, that a conveyance in mortgage, under clauses of similar import, does not avoid the policy. *Jackson v. Mass. Mut. Fire Ins. Company*, cited above. *Conover v. Mut. Ins. Co. of City and County of Albany*, 3 Denio, 254.

There is as little ground to contend that by the principles of the common law, which prohibits a recovery upon a wagering policy, where the insured never had any interest, or where the insured, previous to the loss, has assigned and transferred his interest to another, the plaintiff is precluded from recovering. Even as a mortgagee, he would have a substantial insurable interest. *Swift et al. v. Vt. M. F. Ins. Co.* 18 Vt. 305.

The judgment of the court is affirmed.

GILBERT vs. THE NATIONAL INSURANCE COMPANY.¹

(Queen's Bench, Ireland, May 2, 1848.)

Pleading. — Warranty.

In a declaration on a policy of insurance against fire, an averment that the premises insured were the property of the plaintiff is unnecessary.

A statement in the policy, that the premises insured were the property of the plaintiff, does not amount to a warranty.

COVENANT upon a policy of insurance. The declaration set forth a policy deed poll, made the 23d of June, 1847, reciting that the plaintiff had paid the sum of seventeen shillings and sixpence unto the secretary of the corporation, and had agreed to pay or cause to be paid unto them the entire sum of seventeen shillings and sixpence yearly during the continuance of the policy, for insuring from loss or damage by fire the sum of £350; that is to say, £250 on the buildings of his, the said

¹ 12 Irish Law, 143.

Pleading. — Warranty.

plaintiff's, cottage, stable, and offices adjoining, situate at, &c., £100 on the building of a barn near to, but detached from, the above, and which said buildings were in said deed poll described as thatched; and it was made known by the said deed poll or policy, that from the date of the policy until the 23d of June, 1848, and so long as the plaintiff should pay or cause to be paid, the sum of seventeen shillings and sixpence, and the corporation should agree to accept the sum, the stock and funds of the corporation should be subject and liable to pay the plaintiff, or his executors, administrators, or assigns, all damage and loss which he, the plaintiff, should suffer by fire, not exceeding £350.

The declaration then set forth the several conditions or proposals on which the policy was effected; then stated that the said cottage, stable, and offices were consumed by fire on the 28th of July, 1847, and that the plaintiff had thereby sustained damages to the amount of £250. It then averred that nothing had been done in contravention of the proposals; that notice of the destruction of the property by fire was given to the company, and a particular account of the damage sustained thereby by the plaintiff, and an offer to prove it and to arbitrate; and assigned breach in the usual form.

General demurrer to this declaration.

Barlow (with whom was *Brewster*), in support of the demurrer. The only point relied on in this case is, that the plaintiff has not in his declaration averred that the premises therein stated to be insured and destroyed by fire were his at the time when the policy was effected, or that he was interested in them then, or at the time they were so destroyed by the fire. The policy of insurance states that the premises were the property of the plaintiff; that is an express warranty, and the plaintiff not having averred it in his declaration, the declaration is demurrable. *Lothian v. Henderson*; ¹ *DeHahn v. Hartley*; ² *Woolmer v. Muilman*.³ The eighth condition stated in the declaration — namely, that if any person shall insure *his* house, goods, &c., and describe the same otherwise than they really are, the policy is to be void — shows that the company contemplated effecting a policy with the owner of the property only. In *The*

¹ 3 B. & P. 499.

² 1 T. Rep. 343.

³ 3 Burr. 1419.

Pleading. — Warranty.

British Commercial Insurance Company v. Magee,¹ it was held that it was not necessary for the plaintiff to have an interest in the life he insured; but that is contrary to decided cases in England. *Cousins v. Nantes*.² All the precedents, without exception, state an interest in the plaintiff; that is in the nature of a condition precedent, and the performance of it should have been averred. *Collins v. Gibbs*;³ *The Mayor of Salford v. Ackers*;⁴ *Fryer v. Coombs*;⁵ *Thompson v. Withers*;⁶ *Vincent v. Scully*;⁷ *Hamley v. Hendon*.⁸

Ryan, contra. If an averment of interest be necessary at the time of the execution of the policy and at the time of the loss, there is a sufficient statement of that in the declaration; for in the policy, as set forth in the declaration, there is a recital that the buildings and premises were the property of the plaintiff. This recital is sufficient in a declaration; for it is an exception to the rule that more certainty is required in a declaration than in a plea; even on special demurrer that recital would be sufficient; and if that show sufficient interest at the time of the execution of the policy, that shows sufficient at the time of the loss; *Price v. Price*;⁹ for the court will presume the interest continued. But further, the case of *British Commercial Insurance Company v. Magee*, which cites all the cases on the other side, shows that an averment of interest is not necessary; that was a case of marine insurance, and is governed by 19 G. 2, c. 37. As to precedents, it is only since the passing of the statute 14 G. 3, c. 38, that they contain an averment of an interest.

But even supposing it necessary, and omitted, it must be taken that in this country at common law it would be sufficient to prove it at the trial: *Cohen v. Hannam*;¹⁰ *Godsall v. Boldero*.¹¹

Butt, on the same side, was not called on.

Brewster replied: I assume the law to be as decided by *The British Commercial Insurance Company v. Magee*; but that

¹ Cook & Al. 182.

² 3 Taunt. 513.

³ 2 Burr. 899.

⁴ 16 M. & W. 85; S. C. 1 Saund. 235,

n. 8.

⁵ 11 A. & E. 403.

⁶ 2 Bull. 263.

⁷ 10 Ir. Law Rep. 28.

⁸ 12 Mod. 327.

⁹ 4 Dowl. & Low. 543.

¹⁰ 5 Taunt. 106.

¹¹ 2 Smith, L. C. 165.

Misrepresentation as to Title.

point the court is not now called on to decide. I say the policy contains a warranty that the goods were the property of the plaintiff; and if that be so, it does away with the effect of the statute, and also with the sufficiency of mere proof at the trial. If the argument on the other side be correct, even in England it is unnecessary to aver an interest if it appear on the face of the policy.

BLACKBURN, C. J. I do not see how there is warranty in the case, for the plaintiff cannot recover damages unless he shows damage was actually sustained. *Godsall v. Boldero*¹ established that all these are contracts of indemnity. A warranty is with respect to some fact or circumstance with a view to the taking or refusing the risk. With regard to the policy, it does not signify who was the owner of the property; for when it is sought to recover, then it must be shown how the plaintiff is damaged. *The Sadlers' Company v. Badcock*.² I do not think there is a warranty; we must therefore overrule the demurrer.

Brewster applied for liberty to plead.

Per CURIAM. We cannot allow you to plead, unless you make out a case on a substantive motion for the purpose.

Demurrer overruled.

JOHN B. BROWN vs. JONATHAN WILLIAMS & THE THOMASTON MUTUAL FIRE INSURANCE COMPANY, as Trustees.³

(Supreme Court, Maine, May Term, 1848.)

Misrepresentation as to Title.

Where a mutual fire insurance company were entitled to lien on all property insured by them, and where one condition of the insurance was, that if the representations made by the applicant for insurance were materially false, the policy should not cover the loss; and where the insured, in his application, stated that he was the owner of the building insured, when he had only a bond for a deed of it upon the performance of certain conditions, which have never been performed; *it was held*, that the company was not liable to pay for a loss by fire, otherwise within the policy.

THE facts sufficiently appear in the opinion of the court. Applications in writing for insurance were required to be made,

¹ 9 East, 72, overruled in 15 Com. B. 365. But that was a case of life insurance.

² 2 Atk. 554.

³ 28 Maine, 252.

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and certain questions to be answered. In this case, one was: "*Question.* Who is the owner of the building? Is there any incumbrance? *Answer.* Applicant."

On the same paper was the following:—

"N. B. — If the representation above is materially false, the policy will not cover a loss or damage done to the property."

In the policy, reference was made to the application.

M. H. Smith, for the trustees, made one point, that the company was not liable, because the applicant represented himself to be owner of the land and buildings, when in fact he was not. It was required by the very terms of the policy, that this should be stated; and the applicant was warned that the policy was void on failure of compliance. This was not mere matter of form, for it was the only security the insurers had, that the losses would be paid.

Ruggles, for the plaintiff.

The opinion of the court was given by

WHITMAN, C. J. The defendant being defaulted, and the trustees, who are the Thomaston Mutual Fire Insurance Company, having disclosed, we are required to determine whether they are chargeable or not. If they are, it is because they were, at the time of the service of the writ upon them, answerable upon two policies against damage by fire, issued by them in favor of the defendant, Williams, upon buildings represented by him to be his, and which had been consumed by fire, before that time. The company are entitled to a lien on all property insured by them, to secure the payment of premiums or assessments.

Propositions for insurance are made to the company in a form prescribed by them, containing interrogatories, which are to be answered by the applicant. The policies issued refer to the applications made in each case, and are conditioned, if the statements made in the application be not materially true, that the policies shall be void. It is insisted for the company, that the applications for the policies relied upon by the plaintiff contain untrue statements, as they represented that the buildings described therein were the defendant's property, and also that the policies contain the same untrue statements. It appears that both applications and policies do contain such a state-

Misrepresentation as to Title.

ment. They call the buildings *his*. And there was an omission in both applications to answer the interrogatories as to whether there was any incumbrance on the property. It appears that the defendant had no legal title to the property insured. He had only a bond for a deed of it, upon the performance of certain conditions, which have never been performed. The company, therefore, could have no lien upon the estate insured. The misrepresentation, therefore, was materially untrue; for each member of the company was interested in having such a security, from every other member thereof, as would insure the payment of his proportion of any losses occurring during their mutual membership. If an assessment upon one should fail to be collected, it must be assessed upon the others.

It is true that an equitable interest may be the subject of an insurance; and in policies obtained at the common offices for the purpose, it need not be described as such. But at mutual insurance offices it must necessarily be otherwise, when a lien in behalf of all concerned is to be created. It then becomes material that the company should become apprised of the true state of the ownership in the property insured. It will operate as a fraud upon the members of the company, if the applicant calls the property proposed to be insured *his*, and thereupon obtains an insurance of it, when in fact he has but a contingent interest in it, and, as in this case, of a very precarious kind, and in reference to which a lien in behalf of the company could not be enforced.

An attempt was made to make it appear that the agent of the company was informed that defendant, when he made his applications, had no other title than a right to a conveyance upon the performance of certain conditions. But such facts, as the evidence stands, cannot be regarded as established. The defendants' agent merely says he is not positive, but thinks he did state to Loring, the agent of the company, that there were incumbrances upon the land upon which the buildings were erected; that he does not, at this distance of time, recollect the particulars of the conversation; and again, that he knows the defendant did not own the land, and thinks he so informed Loring; but he is positive that nothing was said of Reed's ownership, with whom the defendant had contracted for the

Warranty. — Reference to Application.

land. Loring, however, is positive that if anything had been said to him about any defect in the title, it would have appeared in the defendant's application which he filled up at the request of his agent, and none appears therein.

Our conclusion is, therefore, that the policies were not obligatory upon the company, and therefore that, as trustees, they must be discharged.

EGAN vs. MUTUAL INSURANCE COMPANY OF ALBANY.¹

(Supreme Court, New York, May Term, 1848.)

Warranty. — Reference to Application.

The policy in this case contained the following clause: "Reference being had to the application of the said K. E. for a more particular description and forming a part of this policy." *Held*, that the application was thereby engrafted as a whole into the contract, and its statements all made warranties.

THE case is stated in the opinion of the court.

D. Wright, for the plaintiff in error.

N. Hill, Jr., for the defendants in error.

By the Court, BEARDSLEY, C. J. Immediately after a brief description of the property insured, we find the following clause in this policy: "Reference being had to the application of the said Kiran Egan for a more particular description and forming a part of this policy." It was argued by the counsel for the defendants in error, that this reference to the application was not made with a view to engraft all its stipulations into the contract of insurance, but for the single purpose of a more "particular description" of the property insured. I cannot assent to this as a correct interpretation of the clause. It was conceded on the argument that if the clause of reference had contained but a single additional word, so that it would have read "for a more particular description and *as* forming a part of this policy," the entire application would have been made a part of the contract; and such, upon adjudged cases, would certainly have been the result. *Burrill v. The Sar. County Mut. Ins. Co.* 5 Hill, 188; *Trench v. The Chenango County Mut. Ins. Co.* 7 Ib.

¹ 5 Denio, 326.

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122; *Jennings v. The Same*, 2 Denio, 75. I am unable, however, to see any solid ground for a distinction in principle and effect, between these different forms of reference. The word "as" is, perhaps, usually inserted in these clauses, and it may be conceded that it gives point to the reference, so that no doubt can, in such case, remain that the entire application was intended to be made a part of the contract between the parties. The degree of certainty in such reference exceeds that in the present case. Still, I cannot say that the latter, although less direct, should receive a more restricted interpretation. It seems to me that it affirms with all requisite certainty, that the application forms a part of the policy; and in this sense I think it should be understood and enforced.

It is expressly declared in the application that if an insurance is effected pursuant thereto, and the insured "shall suffer any judgment or decree, operating as a lien on said property or any part thereof, to pass against him, the policy shall be void, unless he shall make a representation thereof in writing to the directors of said company, stating in whose favor such judgment or decree was rendered, and in case such representation is made, said directors shall have power to give their assent to the same, or to cancel said policy, as they shall judge proper on examination."

This clause, forming part of the contract of insurance, constituted an express warranty that, if any such judgment or decree should pass against the applicant, so as to become a lien on the property insured, the policy should be void, unless a proper representation thereof was made in writing to the directors. 1 Phil. on Ins. 346. The insurance was on this condition, and although the warranty was promissory, the party insured was bound to a strict performance. Ellis on Ins. 28; Hughes on Ins. 308; 1 Phil. on Ins. 346. On the trial, defendants offered to prove that several judgments were rendered against the insured, after the making of the policy and before the fire, and which became liens on the house which was burned and for which the plaintiff sought to recover. This evidence was rejected by the court, and the counsel for the defendants excepted. I think the court below erred in excluding this evidence. Had the fact been proved as offered, it would

Policy. — Pleading. — Limitation. — Notice of Loss.

have shown a palpable breach of the contract of warranty, and the policy must have been held void, unless a proper representation in regard to the judgments had been made by the insured.

I also think the court erred in holding that the plaintiff was entitled to recover the full value of the house destroyed. The application, which was in every respect a part of the contract of insurance, had this clause: "The real property above specified is herein estimated by me at two thirds of its cash value. Such estimate, however, is not to be conclusive on the company; and should I be insured pursuant to this application, I agree that in case of loss by fire, the said company shall only be obliged to pay as if they had insured two thirds of the actual cash value of said property, anything contained in this application or the policy of insurance to the contrary notwithstanding." Parties must be allowed to make such contracts as they please, unless illegal in their terms or spirit. *Beadle v. The Chenango County Mut. Ins. Co.* 3 Hill, 161. These parties agreed that the company should only be bound "to pay as if they had insured two thirds of the actual value of said property." Clearly, on such an insurance, the company could never be liable for the *full value* of the property insured. Yet the court held, in this case, that the plaintiff was entitled to a verdict for the full value of the house destroyed. This was erroneous.

Judgment reversed.

KETCHUM vs. THE PROTECTION INSURANCE COMPANY.¹

(Supreme Court, New Brunswick, Trinity Term, 1848.)

Policy. — Pleading. — Limitation. — Notice of Loss.

In a fire policy, the insurers, by an indorsement thereon, consented that the loss should be payable to the order of W. : Held sufficient in a declaration of covenant on the policy to allege that the loss was not paid to the plaintiff nor to W. ; and that as such indorsement gave W. no legal interest in the property, it did not preclude the assured from maintaining an action in his own name; nor was it necessary to aver any order from W. in favor of the assured.

By the tenth condition attached to the policy it was stipulated "that in the event of a loss the assured should deliver to the insurers a particular account in writing, signed with

¹ 1 Allen (N. B.), 136.

Policy. — Pleading. — Limitation. — Notice of Loss.

his own hand, and verified by his oath, and that he should also declare on his oath whether any and what other insurance had been made on the property insured, and in what general manner (as to trade, manufactory, merchandise, or otherwise) the building containing the property insured, and the several parts thereof, were occupied at the time of the loss, who were the occupants of such buildings, and when and how the fire originated, as far as he knew or believed, and that the assured should procure a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor, or otherwise related to the assured; that he had made due inquiry into the cause and origin of the fire, and also the value of the property destroyed, and was acquainted with the character and circumstances of the assured, and did verily believe that the assured really and by misfortune, and without fraud or evil practice, sustained by such fire loss or damage to the amount therein specified." The declaration stated the fire to have happened on the 29th July, 1845, and that the compliance with this condition, in respect of notice of the fire, took place on the same day; as to the delivery of a particular account in writing, on the 20th August, 1845; and in respect to the declaration on oath, the 27th March, 1846: *Held* sufficient, the respective times having been laid under a videlicet; the performance of these acts, whether in due season or not, being matter of evidence. *Held*, also, that as W. had no legal interest, it was not necessary to state that he was not related to the notary.

By the fifteenth condition annexed to the policy, it was declared "that no suit or action of any kind against the insurers for the recovery of any claim under the policy should be sustained in any court of law or chancery, unless such suit should be commenced within the term of twelve months next after the cause of action accrued," &c.: *Held*, that this was a condition subsequent; the subject of a plea. *Held*, also, that an allegation in a count upon a policy containing this condition, that the insurers had no mayor, president, &c., upon whom process could be served (introduced to anticipate a probable objection that the action is not brought within the twelve months), is mere surplusage.

The preliminary proof required by the tenth condition may be waived, and being a question of fact, the mode of waiver need not be stated. The fifteenth condition being the subject of a plea, an averment in the declaration that the insurers had waived it, would not be traversable; therefore it might be passed by without notice. *Held*, also, that it could not be waived; that lapse of time extinguished the liability of the insurers, which could not be revived by waiver; but *semble*, that they might dispense with the condition by deed, and if a deed could avail as a dispensation it should be replied to a plea of the condition. *Held*, also, that the fifteenth condition was valid in law, and operated as an effectual bar everywhere; therefore a plea of the fifteenth condition to a count containing an averment of waiver of this condition, is properly pleaded. A replication to such a plea, that the defendants were a foreign corporation, and that no action could have been sustained within the twelve months unless they had voluntarily appeared, and there was no means of compelling their appearance, although the plaintiff was willing to prosecute within the twelve months, is bad, as it neither confers nor avoids anything material, for the plaintiff might have sued out process within the twelve months, or the defendants might have been sued in the country where they were incorporated, and they are not estopped by voluntarily appearing, from setting up the lapse of time as a defence.

A plea, embodying the tenth condition, which stated that after the fire, to wit, on the 26th of August, 1845, the plaintiff was required by the defendants to deliver an account in writing under his hand, verified by his oath and by his books of accounts, &c., and permit extracts, &c., to be taken respecting the loss, &c., and the plaintiff refused, is not double, as they all go to establish one point, — the non-performance by the plaintiff of that part of the tenth condition.

A traverse in a plea that the plaintiff was not interested in the goods insured to the whole amount of their value, is too large; for if he was interested in any part, he is entitled to recover *pro tanto*.

To a declaration, which averred performance by the plaintiff of all acts required by the

tenth condition to be performed by him, a plea traversing the performance of all these acts is good, according to the rules of pleading at common law.

A plea which first traverses an allegation in the declaration of the delivering an account of loss according to the tenth condition; and secondly, sets up fraud, is unobjectionable.

The refusal to deliver an account in such case is indicative of fraud, and is consistent with the general charge of fraud subsequently made.

A plea alleging false swearing, in a statement A, annexed to the declaration of loss made by the plaintiff, is bad, for not averring that any such statement was annexed, and for not showing when and before whom the oath was made, or in what particular the statement was false.

COVENANT. The declaration contained five counts. The first count alleged that at the city of Saint John, to wit, on the 27th day of January, A. D. 1845, by a certain deed poll or policy of insurance then and there made (profert), in consideration of \$40 to the defendant then and there paid by the plaintiff, the receipt whereof defendants did by the said deed poll acknowledge, they (the defendants) did thereby insure the said plaintiff against loss or damage by fire to the amount of \$4,000 on his general stock of merchandise, not hazardous and hazardous, consisting chiefly of dry goods contained in the shop and ware-rooms in the eastern section of the fire-proof brick and stone building, situate on lot No. 13, on the west side of and fronting on Prince William Street, in the city of Saint John and province of New Brunswick, then occupied by the said plaintiff and other persons for purposes hazardous and not hazardous; and the said defendants did in and by the said deed poll or policy of insurance promise and agree to make good unto the said plaintiff, his executors, administrators, and assigns, all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property as above specified, from the 27th day of January, 1845, at twelve o'clock at noon, until the 27th day of January, 1846, at twelve o'clock at noon, the said loss or damage to be estimated according to the true and actual value of the property at the time the same should happen, and to be paid within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to the said deed poll or policy of insurance; and it was by the said deed poll or policy of insurance provided and declared, that the said defendants should not be liable to make good any loss or damage by fire, which might happen to take place by means of any invasion, insurrection, riot, or civil commotion,

or of any military or usurped power; and it was by the said deed poll further provided, that in case the said plaintiff should have already any other insurance against loss by fire on the property thereby insured, not notified to the said defendants and mentioned in or indorsed upon the said policy, then the said insurance should be void; and if the said plaintiff or his assigns should thereafter make any other insurance on the same property, and should not with all reasonable diligence give notice thereof to the said defendants, and have the same indorsed on the said deed poll or policy of insurance, or otherwise acknowledged by them in writing, the said policy should cease and be of no further effect; and if any subsequent insurance should be made on the property insured, which, with the sum or sums then already insured, should in the opinion of the defendants amount to an over insurance, the defendants reserved to themselves the right of cancelling the said policy by paying the plaintiff the unexpired premium *pro rata*; and in case of any other insurance upon the said property thereby insured, whether prior or subsequent to the date of the said policy, the said plaintiff should not, in case of loss or damage, be entitled to demand or receive of the defendants any greater portion of the loss or damage sustained than the amount thereby insured should bear to the whole amount insured on the said property; and it was by the said deed poll or policy of insurance agreed and declared to be the true intent and meaning of the parties thereto, that in case the said building should at any time after the making and during the continuance of the said insurance be appropriated or applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special rates in the terms and conditions annexed to the said policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates, unless in the said deed poll otherwise specially provided for, or thereafter agreed to by the said defendants in writing, and added to or indorsed upon the said policy, then and from thenceforth so long as the same should be so appropriated,

applied, used, or occupied, those presents should cease and be of no force or effect; and it was moreover declared by the said deed poll, that the said insurance was not intended to apply to or cover any books of accounts, neither securities, deeds, or other evidences of title to lands, nor to bonds, bills, notes, or other evidences of debt, nor to money or bullion; and the said policy was made and accepted in reference to the conditions thereto annexed, which were to be used or resorted to in order to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for; and the said plaintiff in fact says, that the said terms and conditions in and by the said deed poll or policy of insurance mentioned and alluded to are as follows. [A statement of the conditions was then set forth, but the two following only are material in the present case.] "All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and also, if required, their books of account, and other proper vouchers, and permit extracts and copies to be made. They shall also declare on oath, whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; in what general manner (as to trade, manufactory, merchandise, or otherwise) the building insured or containing the subject insured, and several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as they know or believe; they shall also procure a certificate under the hand of a magistrate or notary public most contiguous to the place of the fire (and not concerned in the loss, as a creditor or otherwise, or related to the insured or sufferers), that they have made due inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and are acquainted with the character and circumstances of the person or persons insured, and do know, or verily believe that he, she, or they really, and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss or damage to the amount therein mentioned; and

shall also, if required, submit to an examination, under oath, by the agent or attorney of the company, and answer all questions touching his, her, or their knowledge of anything relating to such loss or damage, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination, if required, the loss shall not be deemed payable. Also, if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy. Where merchandise, or other personal property, is partially damaged, the insured shall forthwith cause it to be put in as good order as the nature of the case will admit, assorting and arranging the various articles according to their kinds, and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each kind. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers, mutually agreed upon, one half the expense to be paid by the insurers. It is furthermore hereby expressly provided, that no suit or action of any kind against said company, for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the cause of action shall accrue; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as exclusive evidence against the validity of the claim thereby so attempted to be enforced."

And the said plaintiff avers that he did at the time of effecting the said policy, to wit, on the 27th January, A. D. 1845, to wit, at the city aforesaid, pay to the said defendants the said sum of \$40 mentioned in the said policy; and the said plaintiff further saith, that the said defendants did after the making of the said policy and before the happening of the loss hereinafter in this count mentioned, to wit, on the 13th May, A. D. 1845, to wit, at the city of Saint John, by indorsement in writing on the said policy, consent that the said policy should cover merchandise either owned by the said plaintiff or consigned to him on commission or on trust, and that the loss if any, was to

be payable to the order of Augustus W. Whipple ; and the said plaintiff further saith that heretofore, and after the making of the said last mentioned policy, to wit, at the city aforesaid, to wit, on the day and year last aforesaid, by a certain deed poll or policy of insurance then and there made (profert), in consideration of the sum of \$26 to the said defendants by the said plaintiff, the receipt whereof the said defendants did thereby acknowledge, they (the said defendants) did insure the said plaintiff against loss or damage by fire to the amount of \$4,000, in addition to the sum already insured by the said first mentioned deed poll or policy of insurance, on the general stock of merchandise not hazardous and hazardous, consisting chiefly of dry goods, either owned by the said plaintiff, consigned to him on commission or in trust, contained in his shop and warerooms, in the eastern section of the fire-proof brick and stone building, situate on lot number 13 on the west side, and fronting on Prince William Street, in the city aforesaid, occupied by the said plaintiff and others, for purposes hazardous and not hazardous ; and the said defendants did in and by the said deed poll secondly in this count mentioned, promise and agree to make good unto the said plaintiff all such loss or damage, not exceeding in amount the sum insured, as should happen by fire to the property as lastly above specified, from the 13th day of May, 1845, at twelve o'clock at noon, unto the 13th day of November, 1845, at twelve o'clock at noon, the said loss or damage to be estimated according to the true and actual value of the property at the time the said loss should happen, and to be paid within sixty days after notice and proof thereof made by the said plaintiff, in conformity to the conditions annexed to the said last mentioned policy ; and the said plaintiff in fact saith, that the last mentioned policy contained the same provisos, agreements, and declarations, terms and stipulations, and to the same effect, as are mentioned and contained in the deed poll or policy firstly in this count mentioned and hereinbefore set forth ; and that the said policy secondly in this count mentioned had the same reference to the same terms and conditions thereto annexed, as are above mentioned and set forth ; and the said plaintiff further saith that by a memorandum in writing, at the request of the said plaintiff indorsed on the said

last mentioned policy by the said defendants, it was declared by the said defendants that the loss, if any, on the said last mentioned policy was to be payable to the order of the said Augustus W. Whipple; and the said plaintiff avers, he did at the time of the effecting of the said last mentioned policy, to wit, on the 13th day of May, in the year last aforesaid, pay to the said defendants the said sum of \$26, mentioned in the said last mentioned policy; and the said plaintiff in fact saith that he, at the time of the making of the said deed poll or policy of insurance first in this count mentioned, and from thence until the time of the making of the said deed poll or policy of insurance secondly in this count mentioned, was interested in the said merchandise mentioned in the said policy first in this count mentioned and thereby intended to be insured, to a large amount, to wit, to the amount of all the moneys thereby insured thereon; and the said plaintiff further saith that he, at the time of the making of the said deed poll or policy of insurance secondly in this count mentioned, and from thence until the loss and damage hereinafter in this count mentioned, was interested in the said merchandise and property in the said two several policies of insurance respectively in this count mentioned, and thereby intended to be insured, to a large amount, to wit, to the amount of all the moneys thereby insured thereon, that is to say, in the sum of \$8,000, which said sum of \$8,000 is equal to the sum of £2,000 of lawful money, &c.; and the said plaintiff further saith, that after the making of the said two several deeds poll or policies of insurance, and before the expiration of the respective times limited in the said two several deeds poll or policies respectively, and whilst the same were and remained in full force, to wit, on the 29th day of July, A. D. 1840, to wit, at the city of Saint John aforesaid, the said insured merchandise and property were burnt, consumed, and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, whereby the said plaintiff then sustained a loss and damage estimated according to the true and actual value of the merchandise and property so burnt, consumed, and destroyed, at the time of the happening of the said fire, to a large amount, to wit, to the amount of \$4,880 = £1,220, of lawful

&c., on the said merchandise and property insured in and by the said deeds poll or policies of insurance, and so burnt, consumed, and destroyed as aforesaid, of all which the said defendants afterwards, to wit, on the day and year last aforesaid, to wit, at the city, &c., had notice; and the said plaintiff further says, that he did not make any other insurance upon the said merchandise and property other than in and by the said two several deeds poll or policies of insurance; and the said plaintiff avers, that he did at the respective times of effecting the said policies cause the building, in which the said merchandise and property so insured by the said policies respectively was contained, and also the said insured property, to be correctly described to the said defendants; and the said plaintiff avers, that at the times of and after the effecting of the said policies respectively, and before and at the times when the said merchandise and property were so consumed, burnt, and destroyed as aforesaid, the risks insured against by the said defendants in and by the said policies respectively or either of them, was not increased by any means within the control of the said plaintiff, nor were the buildings and premises in which the said insured goods were contained occupied in any manner, so as to render the said risk more hazardous, than at the respective times of the making of the said policies; and the said plaintiff further says, that the said building mentioned in the said respective policies was not, at the time when the said merchandise and property were so burnt, consumed, and destroyed as aforesaid, appropriated, applied, or used to or for the purpose of carrying on or exercising therein any trade, business, or vocation, denominated hazardous, or specified in the memorandum of special rates in the said terms and conditions annexed to the said policies respectively, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated extra hazardous, or mentioned in the said memorandum of special rates; and the said plaintiff further says, that although he has in all things conformed himself to and performed and observed all and singular the articles, stipulations, matters and things in the said two several deeds poll or policies of insurance contained, which on his part were to be performed and observed, according to the tenor and effect, true in-

tent and meaning of the said two several deeds poll or policies of insurance ; and although the said plaintiff did use all possible diligence in saving and preserving the said merchandise and property insured as aforesaid ; and although he (the said plaintiff) did forthwith after the said merchandise and property were so consumed, burnt and destroyed as aforesaid, give notice thereof to the said defendants, to wit, on the 29th day of July, in the year last aforesaid, to wit, at the city, &c. ; and although he (the said plaintiff) did, as soon as was possible after such fire, to wit, on the 20th August, in the year last aforesaid, to wit, at the city, &c., deliver in a particular account, in writing, to the said defendants of such loss or damage, signed with his own hand and verified by his oath ; and although he (the said plaintiff) did after the said fire, according to the said conditions, to wit, on the 27th March, A. D. 1846, to wit, at the city, &c., declare on his oath that no other insurance was made on the same property, and did then and there declare what was the whole value of the subject insured, in what general manner the building containing the said merchandise and property so insured, and the several parts thereof, were occupied at the time of the loss above mentioned, and who were the occupants of said building, and when and how the said fire originated so far as he (the said plaintiff) knew or believed, and did after the said fire, to wit, on the day and year last aforesaid, to wit, at the city, &c., deliver such declaration on oath to the said defendants ; and did then and there procure a certificate under the hand of Samuel Scovil, a notary public most contiguous to the place of the said fire, and not concerned in the said loss as a creditor or otherwise related to said the plaintiff, that he (the said notary) had made due inquiry into the cause and origin of the said fire, and also as to the value of the said property destroyed, and that he was acquainted with the character and circumstances of the said plaintiff, and that he (the said notary) did verily believe that he (the said plaintiff) really and by misfortune, and without fraud or evil practice, had sustained by the said fire loss and damage of the property so insured as aforesaid, to wit, to the amount in the said certificate mentioned, to wit, the sum of \$4,880 and upwards ; and although he (the said plaintiff) did after the said fire, to wit, on the day and year last aforesaid, to

wit, at the city, &c., deliver to the defendants such certificate, and although a long time, to wit, more than sixty days have elapsed since the said defendants had notice of the said fire, and of the said damage and loss of the said plaintiff therefrom as aforesaid, and since the proof of the loss was received by the said defendants at their office, yet the said plaintiff in fact says, that the said defendants have not paid unto him (the said plaintiff) the said loss and damage, or replaced the merchandise and property so insured, and so, to wit, consumed and destroyed as aforesaid, with other merchandise and property of the same kind and equal goodness, nor have they (the said defendants) paid the said loss and damage unto the said Augustus W. Whipple, or to his order, contrary to the tenor and effect, &c., of the said two several deeds poll or policies, and of the covenants of the said defendants on that behalf so made as aforesaid; and the said plaintiff in fact says that the said defendants, although often requested so to do, have not kept the said covenants, &c., by them made as aforesaid, but have broken the same, and to keep the same with the said plaintiff have hitherto wholly refused, and still do neglect and refuse. Second count: And whereas also heretofore, to wit, at Hartford, in the state of Connecticut, one of the United States of America, that is to say, at the city aforesaid, in the city, &c., to wit, on the 27th January, A. D. 1845, the said defendants then and there being a company by the laws of the said State of Connecticut, incorporated by the name of the Protection Insurance Company, and having power by the laws of the said state to act as an incorporated company in the name of the said Protection Insurance Company, and by and under their common seal, and the said company then and there having and using a common seal, and having power and authority by the laws of the said state to make and enter into the deeds poll or policies of insurance hereinafter in this count mentioned, by a certain other deed poll or policy of insurance then and there made (profert). The count then alleged that the losses were to be paid to the order of Augustus W. Whipple, and averred as follows: that at the time of the making of the policy of insurance in this count first mentioned, to wit, on the 27th January, 1845, and from thence continually

up to the time of the commencement of this suit, there was not in the province of New Brunswick any mayor, president, or other head officer, or any secretary, clerk, treasurer, or cashier of the said corporation, or other person upon whom service of process against the said defendants could be made, according to the act of assembly prescribed for the service of process on corporate bodies, whereby the said plaintiff could compel the appearance of the said defendants to any suit in any court of law within this province. Averment of waiver of the tenth condition, as far as respects the certificate of a magistrate or notary. Breach, in non-payment to plaintiff or to Augustus W. Whipple. The third count stated, that heretofore and at respective times of making the deeds poll and effecting the insurance hereinafter mentioned in this count, the said defendants were incorporated by the laws of the state of Connecticut, one of the United States of America, then in force within the said state, and had authority by the laws of the said state of Connecticut to make and enter into the deeds poll or policies of insurance in that count mentioned, and by the said laws had authority to sue and were liable to be sued within the said state by and under the name of the Protection Insurance Company, by which they are and were incorporated; and the said defendants at the time of the commencement of this suit were and continued so incorporated as in this count mentioned; and the said plaintiff further saith, that the individual members or persons constituting the said incorporated company were not, at the time of the making of the said respective deeds poll or policies, liable by the laws of the said state of Connecticut, nor have they at any time since the making of the said policies been liable to be sued personally within the said state of Connecticut, upon or in respect of any deeds poll or insurance effected by the said company, by or in the name and under the seal of the said corporation; and the said plaintiff saith, that the said defendants were not at any time or times heretofore, and are not now incorporated by virtue of any act of assembly of this province, or by virtue of any act or acts of the imperial parliament of Great Britain and Ireland, or by any royal charter or otherwise, than by the laws of the said state of Connecticut as aforesaid; and the said plaintiff further saith, that

the defendants being so incorporated by the said laws of the said state of Connecticut as in this count is mentioned, they (the defendants) at Hartford, in the said state of Connecticut, to wit, at the city aforesaid, to wit, &c. The remainder of the count was similar to the first count. Breach, non-payment to plaintiff or Whipple. Fourth count: Like the first count, with this difference, that it alleges a waiver of the tenth condition as far as respects certificate, and also an averment that the defendants waived and discharged the plaintiff from the performance and observance of and compliance with the fifteenth condition. Fifth count: In all respects like first count, except that it averred that the loss was payable to the order of Whipple, and alleged a waiver of the tenth condition as respects the certificate of a magistrate, &c. The defendants, after craving oyer of the policies, &c., pleaded, — 1st. *Non sunt facta* to all the policies in the first, second, third, fourth, and fifth counts. 2d. *Actio non*, because they say that the plaintiff after the said losses and damage by fire in the first, second, third, fourth, and fifth counts, in the said declaration respectively mentioned, to wit, on the 26th August, 1845, at Saint John aforesaid, &c., was required by the said company to deliver in an account in writing of the said loss or damage, signed with his own hand, and verified by his oath or affirmation, and by his books of account and other proper vouchers, and was then and there required to permit extracts and copies to be made therefrom, respecting the amount of the loss and damage suffered in the stock in trade so insured in the said two policies of insurance in those counts mentioned; the same request being then and there a reasonable request in that behalf, he (the plaintiff) then and there neglected and refused to deliver in such account to the said company, and then and there refused to permit extracts and copies to be made from his books of account or other vouchers, touching and concerning the amount of the loss or damage suffered in the said stock in trade, insured in the said two deeds poll or policies of insurance in those counts severally mentioned, and hath not delivered the same or permitted the same, contrary, &c. to the tenth condition. Verification. (The same plea to all the counts.) 3d. That at the time of the making of the said deeds poll or policies, first, in the first, second, third, fourth, and fifth counts,

of the said declaration mentioned, and from thence until the time of the deeds poll or policies, &c., secondly, in the said several counts respectively mentioned, the said plaintiff was not interested in the same merchandise mentioned in the said policies first in the said several counts respectively mentioned, and thereby intended to be insured to a large amount, to wit, to the amount of all the moneys thereby insured thereon, and that at the time of the making of the said deeds poll or policies, &c., secondly, in the said several counts respectively mentioned, and from thence until the loss and damage thereafter in those counts respectively mentioned, the said plaintiff was not interested in the said merchandise and property in the said two policies, &c. respectively in those counts mentioned to a large amount, to wit, to the amount of all the moneys thereby insured thereon, that is to say, the sum of \$8,000 = £2,000, as in the first, second, third, fourth, and fifth counts of the said declaration respectively mentioned; concluding to the country, &c. (Same plea to the whole declaration.) 5th. Plea of the fifteenth condition to all the counts of the declaration, viz., *Actio non*, because they say that in and by the printed conditions annexed and referred to by the said deeds poll or policies of insurance respectively mentioned, it was amongst other things expressed, declared, and provided, that no suit or action of any kind against said company, to wit, the said defendants, for the recovering of any claim under or by virtue of the said deeds poll or policies of insurance should be sustainable in any court of law or chancery, unless such suit or action should be commenced within the term of twelve months next after the cause of action should accrue; and in case any such suit or action should be commenced against the said company, to wit, the said defendants, after the expiration of twelve months next after the cause of action should have accrued, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be inferred; and the said defendants further say, that the said several supposed causes of action in the said declaration mentioned (if any such have been or still are) did not, nor did any or either of them, accrue to the said plaintiff, at any time within the term of twelve months next before the exhibiting of the bill of the said plaintiff against the

said defendants in this behalf, in manner and form as the said plaintiff hath above thereof complained against them, the said defendants, and this, &c.; concluding with verification. 6th. As to the first count, that the plaintiff did not give notice of the loss he had sustained to the said company, and that the plaintiff did not, as soon after as possible, deliver in a particular account of his said loss or damage, signed with his hand and verified by his oath, and did not declare on his oath that no other insurance was made on the same property, and did not, then and there, declare what was the whole value of the subject insured, in what general manner the building containing the said merchandise and property so insured, and the several parts thereof, was occupied at the time of the loss in the first count mentioned, and who were the occupants of such building, and when and how the said fire originated, so far as he (the said plaintiff) knew or believed, and did not deliver such declaration on oath to the said defendants; and did not, then and there, procure a certificate under the hand of Samuel Scovil, a notary public most contiguous to the place of the said fire, and not concerned in the said loss as a creditor or otherwise, or related to the said plaintiff, that he (the said notary) had made due inquiry into the cause and origin of the said fire, and also as to the value of the said property destroyed, and that he was acquainted with the character and circumstances of the said plaintiff, and that he (the said notary) did verily believe that the said plaintiff really and by misfortune, and without fraud or evil practice, had sustained by the said fire loss and damage of the property so insured as therein aforesaid, to the amount in the said certificate mentioned, to wit, the sum of \$4,880 and upwards; and did not deliver such certificate to the defendants in manner and form as the said plaintiff hath above in that count alleged. Nevertheless for plea in that behalf the defendants in fact say that, although the plaintiff did deliver in an account in writing, and a declaration on oath, and a certificate under the hand of Samuel Scovil, yet the said plaintiff did not duly, properly, and reasonably prove his said loss or damage, according to the form and effect of the said tenth condition referred to by and indorsed on the said deeds poll, &c., respectively. And this the said defendants are ready to verify.

(Same plea to all the counts.) 7th. As to the first: *Actio non*, because the said plaintiff did not, as soon as possible after the said loss or damage in this count mentioned, deliver in a particular account of such loss or damage, signed with his hand and verified by his oath, in manner and form as the said plaintiff hath above in that count alleged. Nevertheless, for plea in this behalf, the said defendants say that, in the claim made for the said loss and damage in this said first count mentioned and set forth, there appeared to be fraud within the true intent and meaning of the said tenth condition referred to and indorsed on the said deeds poll, &c., respectively, that is to say, fraud in taking the quantity, nature, and value of teas, ribbons, and other stock in trade, in that count supposed to have been burnt, consumed, and destroyed by fire, contrary to the said tenth condition. Verification. (Same plea to all the counts.) 8th. *Actio non* as to the said first count, because they say that the plaintiff, in order to support his claim for the said loss or damage in that count mentioned, on, &c., at, &c., made a declaration on oath, and the said defendants in fact further say that, in support of the said claim for the said loss and damage in that count mentioned, there was false swearing within the true intent and meaning of the said tenth condition referred to by and indorsed on the said deeds poll, &c., that is to say, false swearing in this, to wit, the said plaintiff then and there swore that the statement annexed to the said declaration on oath, marked A, contained a true statement of the loss and damage of him, the said plaintiff, whereas the said statement marked A, did not contain a true statement of the said loss and damage, contrary to the said tenth condition. Verification. (Same plea to all the counts.) 9th. *Actio non* as to the said first count, because they say that the said plaintiff, in order to support his claim for the loss and damage in that count mentioned, did, after the fire therein mentioned, to wit, on the 6th August, A. D. 1846, to wit, at the city, &c., deliver in a particular account in writing, to the said defendants, of such loss or damage, signed with his own hand and verified by his oath; and the said defendants say that, in support of the said claim for the said loss and damage, in that count mentioned, there was false swearing, within the true intent and meaning of the said tenth

condition referred to by and indorsed on the said deeds poll, &c., that is to say, false swearing in this, to wit, the said plaintiff then and there swore that the statement annexed to the said account in writing, marked A, contained a true statement of the loss and damage of him, the said plaintiff, whereas the said statement, marked A, did not contain a true statement of the said loss and damage, contrary to the said tenth condition referred to by and indorsed on the said deeds poll, &c., respectively. Verification. (The same plea to all the counts.) 10th. *Actio non* as to the first count, because they say that, by the burning and consumption of the said insured merchandise by the said fire, in the said first count mentioned, the plaintiff did not sustain a loss and damage estimated according to the true and actual value of the merchandise and property so burnt, consumed, and destroyed, at the time of the happening of the said fire, to a large amount, to wit, to the amount of \$4,880, as in the said first count is mentioned. Concluding to the country. (Same to all the counts.) 11th. *Actio non* as to the second count, the same plea as the tenth plea to the first count, concluding with a verification. The pleas to the third count were the same as those to the second count, excepting the plea of non waiver of the tenth condition. The pleas to the fourth count were the same as those to the second count, with the addition that the defendants did not waive the fifteenth condition, and the pleas to the fifth count were similar to those pleaded to the second count. The plaintiff replied to the fifth plea, and demurred to the second, third, sixth, seventh, eighth, ninth, tenth, eleventh, thirteenth, and fourteenth pleas, and assigned the following grounds: — Demurrer to second plea — Refusal to permit extracts, &c. Causes: Duplicity, refusal to deliver in an account to defendants, and also to permit extracts of copies to be made from his books of accounts and vouchers respecting loss; one of which refusals constitutes a distinct ground of defence; request to make an account and permit extracts not alleged to be made before action brought or exhibiting bill. It is not stated that the plaintiff had any books of accounts or vouchers relating to loss; that same was made by defendants on the plaintiff, or that the loss had not then been ascertained and proved; and further, the same not alleged to have been

made in a reasonable time. Demurrer to third plea — No interest in goods. Causes: Attempt to raise an immaterial issue; whether plaintiff interested to the amount of all the moneys insured; traverse too large. Demurrer to sixth plea — Tenth condition not complied with. Causes: Attempt to put in issue several matters of defence, each of which is distinct, viz.: that the plaintiff did not give notice of the loss, that he did not deliver a particular account signed and verified by his oath, that he did not declare on his oath that no other insurance was made on the same property, that he did not make and deliver a declaration of value, that he did not make and procure a certificate, and that the plaintiff did not duly, and properly, and reasonably prove his loss. Plea does not show what kind of proof of loss plaintiff failed to make, viz.: whether by verification on his own oath, by books of account, or vouchers, or by his examination; that the plea tenders an immaterial issue by traversing that the certificate in the said first count mentioned to have been obtained was not procured at the time in the said first count mentioned, whereas the time is laid under a *videlicet*, and is immaterial, and no distinct issue can be taken upon the said averments in the said sixth plea; and the defendants attempt to avoid without confessing. Demurrer to seventh plea: Fraud in claim. Causes: Duplicity; attempt to set up several matters of defence, each of which is distinct, viz., that the plaintiff did not as soon as possible after the loss in the said first count mentioned deliver in a particular account of such loss, signed with his own hand and verified by his oath, and that there appeared to be fraud; and for that the plea attempts to avoid the plaintiff's claim by alleging new matters, viz., that there appeared to be fraud in the claim made, without confessing and avoiding that the allegation of fraud is not sufficiently definite, and is of such a nature as to affect the question of loss, &c. Demurrer to eighth plea — False swearing in declaration. Causes: Not sufficiently certain and positive. It is not shown when, where, or how the declaration on oath was made, or before whom the said plaintiff was sworn; and it does not appear that the statement made in the eighth plea was untrue in any material point, or that there was any wilful misstatement; and that it should be

shown in what respect the statement is untrue, in order that the materiality may be seen, and that the plaintiff may be able to take a certain issue on a material point; and that the said eighth plea does not show whether the false swearing was in the Declaration on oath referred to in the eighth plea, or that the alleged false swearing was orally or in any affidavit. Demurrer to ninth plea — False swearing in account in writing. Causes: That it does not show when, where, or how the plaintiff made the alleged false swearing, or before whom the plaintiff was sworn; and that it does not appear that the said statement made in the said ninth plea was untrue in any material point, or that there was any wilful misstatement; and that it should be shown in what respect the statement is untrue, in order that the materiality may be seen, and that the plaintiff may be able to take a certain issue on a material point. Demurrer to tenth plea — Loss not estimated, &c. Causes: Issue tendered too large, and offers issue on an immaterial point, as it is not necessary for the plaintiff to prove a loss to the amount alleged, as he would be entitled to recover for any loss, large or small; also, that the plea does not offer a certain issue as to the plaintiff having sustained a loss by the said fire; also, the plea is double, it traverses a loss to the amount alleged in the first count, and also attempts to put in issue that the loss was not estimated according to actual value of the merchandise burnt at the time of the fire. Demurrer to eleventh plea — That it should have concluded to the country. Demurrer to thirteenth plea — Non-compliance with the tenth condition. Causes: Duplicity; because it sets up several matters of defence, each of which is distinct, viz., plaintiff did not forthwith after merchandise burnt give notice thereof to the defendants; that he did not deliver a particular account in writing to the defendants of the loss, that he did not declare on oath no other insurance had been made, that he did not deliver such declaration on oath to the defendants, that the plaintiff did not prove his loss according to the tenth condition; that plea is uncertain in not showing what kind of proof the plaintiff failed to make, viz., whether by verification on his own oath, by books of account and vouchers, or by his examination. No certain issue can be taken on the averments in this plea, and the defendants attempt to avoid

without confessing. Demurrer to fourteenth plea — Fraud in the claim within the meaning of the tenth condition, assigning similar grounds to those taken to the seventh plea. The plaintiff replied to the fifth plea: that at the time of the making of the policies and the causes of action accrued, and from thence continually until twelve months next thereafter, no action could have been sustained against the said defendants at the suit of the plaintiff in this court, without the defendants voluntarily appearing in the said court to answer the action of the plaintiff, defendants all the time being a foreign incorporated company, and not a company incorporated by any act of assembly of the province, and there being no person at the said time in the province upon whom process in any suit of the plaintiff against the defendants could be made, and there being no means by the course and practice of the court by which the defendants could be brought into the court-house, to answer any action commenced against them by the plaintiff within the said twelve months; and the plaintiff avers, that although he was ready and willing to, and would have prosecuted his said claim for the loss in this court within twelve months after the causes of action accrued, yet the defendants within the said twelve months refused to appear to any action in the said court at the suit of the said plaintiff, by means whereof no action could within the said twelve months have been sustainable against the defendants at the suit of the plaintiff. Verification. The defendants' demurred to this replication, and assigned the following causes: 1st. Replication double, tenders three issues, viz., 1st. No action could have been sustained against the defendants at the suit of the plaintiff without defendants voluntarily appeared in court. 2d. That at the said time, when, &c., there was no person in this province upon whom service of process could be made. 3d. That defendants refused to appear in this court at the suit of the plaintiff. Also the replication shows that defendants are a foreign corporation, and there is nothing to show that they could not have been sued in the country where incorporated, within the time limited by the conditions of the policy. Also, the replication shows the defendants, at the time, &c., were a foreign corporation; that therefore it must be presumed that the plaintiff in-

tended to look for his remedy to the courts of that country only where incorporated. Also, that the replication shows that the defendants were a foreign incorporated company, and that the refusal to appear in this court was the exercise of a right within the terms of the contract, evidenced by the policies. That though it states that the plaintiff had no means of compelling the defendants' appearance in this court, it does not state that he could not compel their appearance in any other court of this province, and that the plaintiff had no remedy against the defendants under the laws of this province. Also, that issues one, two, and three, tendered by the plaintiff, are immaterial. Replication also ambiguous. The plaintiff joined in demurrer, and at the same time gave notice of the following objections to the fifth plea: 1st. That being pleaded to the whole declaration, and not traversing allegations in the fourth count, that the defendants waived and discharged plaintiff from performance of the fifteenth condition; defendants have admitted same, and therefore defendants cannot allege as a defence the plaintiff not doing that which the defendants have discharged him from doing; plea being pleaded to the whole declaration, bad. 2d. That the fifteenth condition applies only to courts within the state of Connecticut, where the policies were effected, as stated in the second and third counts; and the said fifth plea being pleaded to the whole declaration, and bad as to the second and third counts, is bad to the whole. 3d. That the not bringing an action within twelve months after cause of action arose is a mere matter of evidence for the jury, conducing to the proof that no loss was sustained, but no estoppel to an action brought after the twelve months. 4th. That the fifteenth condition applies only to such courts as could have sustained an action at law commenced within the time specified; but as there was no mayor, &c., or other person on whom service of process could have been made, whereby the plaintiff could have compelled the appearance of the defendants to any suit at law here; and as no court of law in this province could sustain action until appearance of the defendants after being served with process, therefore no action could have been sustained as to the cause of action in the second count; the plea being bad to that count, and being pleaded to the whole declaration, is bad.

5th. That courts of law here will administer the remedy within the time limited by the law of the province for bringing actions, and as the time in this case has not elapsed, plaintiff may proceed here, notwithstanding the fifteenth condition. 6th. That the fifteenth condition is repugnant to the body of the said policies, whereby the defendants agree to make good any loss by fire, to be paid within sixty days after notice and proof made in conformity to conditions; and as the conditions allow the assured to deliver in an account as soon after the fire as possible, and do not limit the time of that delivering within twelve months; if he could not do so within that time, and a longer time is reasonable, which may exceed the twelve months from the time the cause of action accrued, and as the defendants agree to pay within sixty days after delivery of the account, which may be after the twelve months, the fifteenth condition would prevent a court of law sustaining an action; the fifteenth condition being repugnant to the body of the policies must be rejected; and therefore, plea alleging action not commenced within the twelve months is bad. 7th. That the defendants not having traversed the allegations in the several counts of the declaration, that the plaintiff did, as soon as possible after the fire, deliver in a particular account, have admitted it; the defendants should have shown that the sixty days from the delivery of the account had elapsed within the period of twelve months after the fire, so as to show that the plaintiff could have commenced an action within twelve months after cause of action accrued. 8th. That the defendants not having traversed the allegation in the second count, that there was not, at the time of the making of the said policies in that count mentioned, and thence up to the commencement of this suit, any person upon whom process could be served to bring defendants into court, they have admitted the same; then the defendants have voluntarily appeared in this court to answer the plaintiff's claim, and by so doing have precluded themselves from pleading that this action was not commenced within twelve months after cause of action accrued — otherwise their appearing after the said twelve months voluntarily to answer the plaintiff's claim would be nugatory, &c.; therefore, the fifth plea setting up this defence to the whole dec-

laration being bad as to the second count, is bad to the whole declaration. 9th. The defendants, not having traversed that the defendants made policies in said third count as a foreign corporation, and that the defendants were not incorporated by any law of this province, and that individual members were not liable to suit — these allegations are admitted; and then as there are no means by which an action at law in this court against the defendants could be sustained on said policies in the said third count mentioned, unless by their own consent in appearing — the fifteenth condition cannot be applicable to any action in this court on the policies in the third count, as the condition must be held to apply to such courts of law only where, at the time of the policy being made, an action at law could have been sustained against the defendants; and the fifth plea being pleaded to the whole declaration, and being bad as to the third count is bad as to the whole. 10th. The plea is bad as to the second and third counts, in the defendants not averring that they were always, within twelve months after the cause of action accrued, ready and willing to appear to any action on the claim mentioned in the second and third counts. 11th. The plea that the plaintiff did not exhibit his bill against the defendants in respect to the cause of action in the declaration mentioned, is bad, as the fifteenth condition only requires the plaintiff to commence an action within one year; and the defendants should have pleaded that the plaintiff did not commence an action within one year after the cause of action accrued. 12th. That the defendants attempt to avoid the causes of action in the declaration without confessing them. The defendants also, at the time of demurrer to the replication to the fifth plea, gave notice of the following objections to the declaration: To the first count — 1st. That it did not appear that Whipple, to whose order the loss (if any) was made payable, made any order on the defendants to pay loss to plaintiff, or for the plaintiff to receive the same from defendants. 2d. It did not appear that the plaintiff had any interest in the policies in the said first count mentioned, or in the amount payable thereon at the time of the loss, or that he sustained any damage by the loss. 3d. That it did not appear that at the time the plaintiff delivered into the company his particular account in

writing, signed by his own hand and verified by his oath, to wit, on the 20th August, 1845, he did also declare on oath whether any or what other insurance had been made on the property therein mentioned, what was the value of the same, in what general manner (as to trade, manufactory, merchandise, or otherwise) the building containing the property insured and the several parts thereof were occupied at the time of the loss, and who were the occupants of such building, and when and how the fire originated, as far as he knew and believed; and did also procure a certificate under the hand of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the plaintiff or Whipple), that they had made due inquiry into the cause and origin of the fire, and also as to the value of the property destroyed, and were acquainted with the character and circumstances of the person or persons insured, and did know or verily believed that the said plaintiff really and by misfortune, and without fraud or evil practice, sustained by such fire loss or damage to the amount therein mentioned, according to the tenth condition: plaintiff's compliance with the tenth condition was at a subsequent period, to wit, on the 27th March, A. D. 1846, contrary to the tenth condition. Also, it did not appear that the notary giving the certificate was not related to Whipple, the payee of the amounts due on the said policies in case of loss. Also, it did not appear that the preliminary proofs required by the tenth condition were produced by the plaintiff to the defendants. Also, it did not appear that the action was commenced within the term of twelve months next after cause of action accrued. Objections to the second count — Same as the first and second objections to the first count. The averment that at the time of making the first policy, and from thence continually, &c., the defendants had no mayor, &c., on whom service of process could be made, was irrelevant and immaterial. Also, that the mode of waiver of the tenth condition as respects certificate was not shown, or that the waiver was binding on defendants, being a corporation.

Also, it did not appear that plaintiff had performed all the conditions, &c., on his part previous to the commencement of

this suit. Also, that it appeared that the delivery of the particulars in writing, and the declaration on oath as set out therein, were not in accordance with the tenth condition of the policy. Also, that it did not appear that this action was commenced within the term of twelve months after cause of action accrued. Also, it did not appear that the preliminary proofs of loss required by the tenth condition, had been produced by the plaintiff to the defendants. Objections to the third count — Substantially the same as those to the first. Objections to the fourth count — Same as the first and second objections to the first count, and similar to some of the objections to the second count. Objections to the fifth count — Substantially the same as to the fourth.

The abstract on the opposite page exhibits the pleadings in the case.

The case was argued in Easter term last, by

Jack & Kaye, for the plaintiff. It will be convenient to discuss: 1st. The objections to the declaration; 2d. The demurrers to the pleas; and 3d. The demurrer to the replication to the fifth plea, and the exceptions to that plea. First count. The first objection to the declaration is, "That Whipple, to whose order the loss under the two policies was made payable, has made no order to the plaintiff to receive the loss." This objection is clearly untenable. Whipple is no contracting party, no right of action is vested in him, and it would upon the most obvious rules of pleading be impossible to sustain a declaration in which he was made a plaintiff. The first count negatives the fact of a payment either to the plaintiff or to Whipple, which is quite sufficient. If the defendants had paid Whipple, it would be a matter of defence. Second objection: "That the plaintiff had no interest in the policies." This objection is merely an amplification of the first objection, and like it, based upon the assumption that Whipple is clothed with the right of action, and not the plaintiff. The law is so plainly opposed to this view, that gravely to argue the question would be a mere waste of time. Third objection: "That it does not appear by the count that the plaintiff delivered into the company his particular account in writing, signed with his own hand and verified by his oath, &c., according to the tenth condition." The

The subjoined abstract exhibits the pleadings in this case:—

DECLARATION.	PLEAS.		ISSUES, DEMURRERS, AND REPLICATIONS.	JOINDERS AND DEMURRERS.
1 Count.	To the whole declaration.	1st. Non sunt facta. 2d. Refusal to permit extracts. 3d. No interest in goods. 4th. Goods not burnt. 5th. Action not commenced within twelve months.	Issue joined. Demurrer special. Demurrer special. Issue joined. Replication — plff. non potuit; defendt. absente.	Joinder. Joinder. Demurrer and joinder.
1st Count.	To first count, Five pleas, viz.:	6th. I. Tenth condition not complied with. 7th. II. Fraud in claim. 8th. III. False swearing in declaration on oath. 9th. IV. False swearing in account in writing. 10th. V. Loss not estimated, &c., &c.	Demurrer special. Demurrer special. Demurrer special. Demurrer special. Demurrer special.	Joinder. Joinder. Joinder. Joinder. Joinder.
2d Count.	To second count, Six pleas, viz.:	11th. I. Loss not estimated, &c., &c. 12th. II. Defendants did not waive compliance with tenth condition as to notarial certificate, &c. 13th. III. Non-compliance with tenth condition. 14th. IV. Fraud in claim within meaning of the tenth condition. 15th. V. False swearing in account in writing. 16th. VI. False swearing in declaration on oath.	Demurrer special. Issue joined. Demurrer special. Demurrer special. Demurrer special. Demurrer special.	Joinder. Joinder. Joinder. Joinder. Joinder. Joinder.
3d Count.	To third count, Five pleas, viz.:	17th. I. Loss not estimated, &c., &c. 18th. II. Non-compliance with tenth condition. 19th. III. Fraud in claim within tenth condition. 20th. IV. False swearing in account in writing. 21st. V. False swearing in declaration on oath.	Demurrer special. Demurrer special. Demurrer special. Demurrer special. Demurrer special.	Joinder. Joinder. Joinder. Joinder. Joinder.
4th Count.	To fourth count, Seven pleas, viz.:	22d. I. Loss not estimated, &c., &c. 23d. II. Did not waive tenth condition as to notarial certificate, &c. 24th. III. Did not waive fifteenth condition. 25th. IV. Non-compliance with tenth condition. 26th. V. Fraud in claim. 27th. VI. False swearing in account in writing. 28th. VII. False swearing in declaration on oath.	Demurrer special. Issue joined. Issue joined. Demurrer special. Demurrer special. Demurrer special. Demurrer special.	Joinder. Joinder. Joinder. Joinder. Joinder. Joinder. Joinder.
5th Count.	To fifth count, Six pleas, viz.:	29th. I. Loss not estimated, &c., &c. 30th. II. Defendants did not waive tenth condition as respects certificate of notary, &c. 31st. III. Non-compliance with tenth condition. 32d. IV. Fraud in claim. 33d. V. False swearing in account in writing. 34th. VI. False swearing in declaration on oath.	Demurrer special. Issue joined. Demurrer special. Demurrer special. Demurrer special. Demurrer special.	Joinder. Joinder. Joinder. Joinder. Joinder. Joinder.

tenth condition requires that the assured shall as soon as possible after a fire deliver in a particular account in writing to the company of such loss, signed with his hand and verified by his oath; yet that part of the tenth condition which requires the assured to declare on oath that no other insurance was made on the same property, &c., is not limited as to time, and need not be made simultaneously with that respecting the fire. Fourth objection: "That it does not appear that the action was commenced within twelve months next after the cause of action accrued." This objection is the subject matter of a plea, to which the plaintiff might have replied any matter which he deemed proper. The first count it will be recollected differs from the fourth. In the latter a special averment is introduced, setting forth the reasons why the action was not commenced within the twelve months. The matter of the special averment in the fourth count might have been the subject of a good replication to the plea, but the objection cannot be urged against the first count. The first and second objections to the second count are the same as those to the first count, and have been already answered. The third objection to the second count is addressed to the averment: "That at the time of the making of the policies, &c., the corporation (the defendants) had no mayor, &c., upon whom process could be served." This is a material, and of course a traversable averment. It was not in the power of the plaintiff to prosecute his action until there was some person upon whom process could be served, and it was competent for him either to allege this in his declaration, and thus anticipate the ground of defence which the defendants might set up, or the plaintiff could make it the subject of a replication in the event of a plea requiring such a reply. Fourth objection to the second count: "That the plaintiff has not shown how the defendants waived the tenth condition." This is clearly matter of evidence, and may be proved either expressly or impliedly from the conduct of the parties. It is like the preliminary proof in an action upon a marine policy, — the waiver of which in all the precedents, is stated as it is here. As to the fifth objection, the plaintiff has averred performance of all the tenth condition except that portion of it which he alleges to have been waived. The sixth objection is so vague that it is impossible to see dis-

tinctly what the defendants mean by it. The exceptions to the third count are all open to the same remark. Then with respect to the objection to the fourth count, as to the waiver of the fifteenth condition, the same arguments that have been advanced in support of the allegation of waiver of the tenth condition apply here. In fact the precedent is taken from *Chitty*, and is continually used without objection. Demurrers to the pleas — Second Plea : “Refusal to permit extracts.” This plea sins against the principle of the rule that the issue must be single. The tenth condition contains a variety of stipulations, each distinct in its nature.

The defendants have alleged two refusals: 1st. A refusal by the plaintiff to deliver in an account in writing of his loss; 2d. A refusal to permit extracts to be made from his books. This plea would therefore raise two issues, either of which if found in favor of the defendants would decide the cause. The matters are quite distinct. In the first instance, all that is necessary is an account of the loss verified by the plaintiff's oath; and then, “if required,” there must be further proof by the books; but the request to furnish the further proof is a condition precedent on the part of the defendants. The word “permit” implies a request, but until such request is made there is no breach of the condition. The defendants should have stated their plea in clear and unambiguous language; if there is any ambiguity in it, the construction must be against the party pleading. The word “then” in a plea has been held to be ambiguous. *Stead v. Poyer*.¹ It should have appeared that the request to deliver an account from the books was made to the plaintiff before action brought. By the eleventh condition, payment is to be made within sixty days after proof of the loss, and the defendants should have shown that they made the application for further proof within that time; because after the expiration of the sixty days, without any request of further proof, the plaintiff had a right of action which could not be divested. The plea is also bad for not stating positively that the plaintiff had books of account: it only appears by inference. Demurrer to the third plea. The traverse here is, that the plaintiff is not interested to the whole value of the goods.

¹ 3 Dowl. & L. 209.

insured; a mere negative of the language of the declaration; and it goes to this extent, that if the plaintiff's interest in the goods, or rather if the goods were not of the full value described in the policies, if they fell one shilling below it, the action could not be sustained. But if he was interested in any part of the goods, he is entitled to recover *pro tanto*; the traverse is therefore clearly too large. If a plea traverses more of an allegation than is material, it is bad as being too large. *Tempest v. Kilner*.¹ The averment of interest at the time of effecting the policy, is satisfied by proof of interest at the time of the loss. Hammond on Ins. 71. Demurrer to the sixth plea. This plea is almost unintelligible; it is also open to the objections urged against the second plea; in addition to which it traverses the time, which being laid under a *videlicet* is not material. *Anderson v. Thornton*.² The policy has reference to three descriptions of proof: 1st. Examination under oath, &c.; 2d. Vouchers; 3d. Delivery of a particular account. By this plea the defendants attempt to put all these in issue. If they wished to put all these distinct and independent matters in issue, they should have pleaded to each separately. The consequent prolixity of the pleadings is an objection of no force. Demurrer to the seventh plea. The allegations in this plea are too general. It first states that the plaintiff did not as soon as possible after the loss deliver in a particular account of such loss, signed, &c., and then goes on to state that there appeared to be (not that there was) fraud in the claim. The expression "as soon as possible" is very vague and uncertain: it lacks that precision which the language of pleading requires. The phrase "there appeared fraud" is loose and objectionable: there ought to have been a positive allegation that there was fraud. Strictly speaking, the words would almost imply the absence of actual fraud. The plea is also bad upon the ground of duplicity, and because it does not confess and avoid; for if there was no fraud, there is not sufficient admitted on the face of the plea to entitle the plaintiff to judgment if there was a verdict in his favor. Demurrer to the eighth plea — False swearing in the declaration. It does not appear that there was any statement marked A. The charge of false swearing ought to be so clear and specific that

¹ 3 Dowl. & L. 407.² 3 Q. B. 277.

perjury might be assigned upon it. It ought to appear when and where the oath was made, in order that the court might judge of the charge of false swearing. *Regina v. Nott*.¹ In *Thurtell v. Beaumont*,² which was an action on a policy, to which the defence was that the plaintiff had wilfully set fire to the property; it was held, that in order to justify a verdict for the defendant, the evidence must be such as would support a criminal charge against the plaintiff for the same offence. Will it be contended on the other side that if there had been an untruth as to five yards of cloth, a hat, or a pair of gloves, all right of action was gone? The meaning of the condition is, that he shall not swear wilfully and corruptly false in any material point. Demurrer to the ninth plea — False swearing in the account in writing. This plea is bad upon some of the grounds urged against the eighth plea; and in some respects it is more objectionable, because it does not confine the false swearing to any particular day. Demurrer to the tenth plea — Loss not estimated. The allegation of loss is not divisible: if the plaintiff proves a partial loss, he is entitled to recover; the traverse is therefore too large, and raises an immaterial issue. The case of *Tempest v. Kilner*³ is an authority against the validity of this plea. This plea comprehends not singly a traverse of the loss by fire, but also asserts that there was no estimate. There might have been a loss by fire for which the plaintiff was entitled to recover, although no estimates were made. Demurrer to the eleventh plea — Fraud in the claim within the tenth condition. This plea ought to have concluded to the country, and not with a verification, because it does not introduce any new matter; there was therefore a complete issue. *Bentley v. Goldthorp*.⁴ If the plea does more than deny the allegation of loss, it is double; so that in either event the plea is bad. *Summers v. Ball*.⁵ These demurrers cover all the pleas demurred to, not only the pleas pleaded to the whole declaration, but those pleaded to the several counts of the declaration. Demurrer to the replication to the fifth plea. The replication shows that the defendants are a foreign corporate body, and that they, within twelve months

¹ 4 Q. B. 768.⁴ 1 C. B. 377.² 1 Bing. 339.⁵ 8 M. & W. 596³ 3 Dowl. & L. 407.

after the cause of action accrued, refused to appear to any action which the plaintiff might commence. Our law provides no remedy to enforce the appearance in our courts of law of foreign corporate bodies. The issuing of a writ, where the defendants refused to appear, would in such case be unnecessary and useless; for the plaintiff could not after such refusal anticipate that they would appear if he issued a writ against them. It is true they have eventually appeared, but they have done so it seems only to raise a technical objection, as to the action not having commenced within the twelve months; whether, except to raise this point, they would have appeared at all is very questionable.

The fifteenth condition must mean that the plaintiff was to prosecute his action, and that he was limited to a certain time to commence the action thus to be prosecuted. But the defendants' refusal to appear put it out of the plaintiff's power to prosecute the action. It is by the act of the defendants' refusal that the plaintiff was prevented from doing what the fifteenth condition required him to do. Then surely, under such circumstances, the defendants will not now be permitted to take advantage of their own act, to bar the plaintiff of his remedy. The case of *Douglas v. Forrest*¹ shows, in a case where the plaintiff had not had power to prosecute his action, the construction put upon the statute of limitations, that the action shall be brought "within six years next after the cause of such actions or suits, and not after;" wherein it was held that the statute did not commence to run while the plaintiff was not in a situation to prosecute his action with effect. So in the construction of the fifteenth condition, it must be held to contemplate a case where the plaintiff would have power to prosecute the action which was to be commenced within the year; this power to effectually prosecute he clearly has not in our courts as against a foreign corporate body, unless the defendants appear to the action voluntarily by their attorney. And it is contended, that if he has not such power as to his claim on the policies in question in any given case, in suits in our courts of law, the fifteenth condition is not applicable to them. The objection to duplicity in the replication is untenable. The matters replied constitute one

¹ 4 Bing. 686.

point. But assuming the replication to be faulty, the fifth plea is bad in substance, on several grounds:—

1st. The fifteenth condition is only applicable to actions in courts where, if an action were commenced within the time limited by the condition, the plaintiff would have power to prosecute the same without any act of the defendants to enable him to do so. The condition implies that there is a cause of action; a court in which the plaintiff has power to prosecute his claim, and in which it would be sustainable; and it then provides that no action shall be sustainable unless the same be commenced within the time limited. Would the action be sustainable in our courts of law unless the defendants voluntarily appeared? It is contended that it would not. The condition assumes that it is in the power of the plaintiff to do what it requires to be done. This it certainly was not in this case, as regards our courts of law, whatever it may have been as respects courts elsewhere. If the plaintiff had the power and did not prosecute in our courts, then there might be reason to deem his claim invalid; but not otherwise. The plaintiff may be barred of his remedy elsewhere, but it is contended that there is nothing in the fifteenth condition which deprives him of his action in our courts, whether it were commenced before or after the twelve months.

2d. The contract in the policies being that of a foreign corporate body in Connecticut, and made in that state, the fifteenth condition must have intended to limit the time for bringing actions within the courts of that state, and those courts only, as that state was the place of performance (namely, payment) contemplated by the parties.

3d. The fifteenth condition is void as being repugnant to the tenth condition. By the latter, no specific time is limited for the delivery by the plaintiff to the defendants of the particular account; it must be within a reasonable time. This under particular circumstances may be more than twelve months from the plaintiff's loss; cases may be supposed in which it would be unreasonable, nay, impossible, to deliver the particular account within the twelve months, yet by the fifteenth condition the action must be commenced within twelve months after the cause of action accrued, that is, from the fire which occasioned

his loss, and the damage sustained at which constitutes his cause of action; so that taking the fifteenth condition as imperatively requiring the commencement of the action within the twelve months, it might in some cases require this when by reason of the necessity on the plaintiff's part of fulfilling the requirements of the tenth condition, he would not be in a situation to sue, and he would without any fault or laches on his part be barred of his remedy. The condition cannot stand with the other.

4th. The fifth plea goes to affect the remedy, and this must be governed by the law of the place where an action is brought and a contract is sought to be enforced. It affects the time within which the action must be brought. Our own statute of limitations regulates this. If these policies had been silent as to the time for bringing the action, still if they were made in the state of Connecticut they would, in construction of law, have incorporated into them the law of the place, as explanatory of the contracts in matters not provided for by them. Yet this would not have affected the remedy on it in our courts. Neither should the fact of the policy containing a prescription within itself alter the case. In seeking the remedy, our own prescription must be looked to and none other.

5th. The fifteenth condition is bad upon the broad ground that it is contrary to the policy of the law; its effect is to oust the courts of law and equity of their jurisdiction by an unreasonable restraint. In the *Earl of Mexborough v. Bower*,¹ the master of the rolls says, "that parties cannot contract themselves out of the right to have their disputes settled in courts of justice." Causes which tend to oust the jurisdiction of the courts are not binding on the parties.

6th. Another objection to the fifth plea is, that the not bringing the action within the twelve months is merely evidence of the invalidity of the claim. The fifth plea attempts to set up the non-commencement of the suit within that time as an estoppel to the plaintiff's claiming at all; it is therefore bad.

7th. But the most obvious objection to this plea is, that it is pleaded to the whole declaration, and is clearly bad as to the

¹ 7 Beav. 132.

fourth count, which alleges that the defendants waived and discharged the plaintiff from the performance and observance of and compliance with the fifteenth condition. The defendants, by pleading over, have admitted this allegation to be true, and they are thereby estopped from now complaining that the action was not brought within the twelve months, they having in effect admitted by the pleadings that they had discharged the plaintiff from the necessity of bringing it within that time. The plea of non-compliance with the fifteenth condition is therefore bad as to the fourth count, and if so, as the plea is pleaded to the whole declaration, and is not divisible, it is bad *in toto*. *Powdick v. Lyon*; ¹ Chit. Pl. (5th ed.) 703.

J. W. Chandler & Gray, contra. The proposition that the only mode of assigning a chose in action, so as to vest in the assignee a right of action in his own name, is by a bill of exchange or promissory note, is not entirely accurate. *Wilson v. Coupland*; ² *Fairlie v. Denton*.³ But even if it were, the proposition would not reach our first and second objections to the declaration. In the case of a marine policy of insurance, it was decided that if D. be insured, and loss (if any) to be payable to F., the latter may, in the event of a loss, maintain an action in his own name. 2 Phillips on Ins. 595. The contracting parties here agreed that the loss should be payable to Whipple, "*modus et conventio vincunt legem*." It seems, then, that Whipple was clothed with the right of action, the legal interest by agreement vested in him, and if he could maintain an action in his own name upon the policies, the plaintiff (Ketchum) could not. At any rate there is no averment of an order from Whipple to Ketchum to receive the money, which it is contended is essential; he having by agreement between the parties been constituted the recipient. As to the third objection to the declaration, viz.: That the plaintiff has not shown that at the time he delivered in his particular account in writing of his loss, he also delivered in the declaration and proofs required by the tenth condition; that he did not declare on oath whether any or what other insurance had been made on the property, &c. As no time is limited for the performance of these acts, the law would imply a reasonable time, and

¹ 11 East, 566.² 5 B. & Ald. 228.³ 8 B. & C. 395.

therefore the declaration should have contained an averment that these acts were performed within a reasonable time. The time in this case is laid under a *videlicet*, the effect of which would be to give the plaintiff indefinite latitude in his evidence, and thus postpone an investigation of the acts until all proof of them should be lost, thereby rendering the expiration of a reasonable time a question which could not be raised. With regard to the allegation of waiver of the fifteenth condition, as stated in the fourth count, it will be recollected that as the defendants are a corporation, and sued as such, then an act of waiver of the fifteenth condition not being incidental to the exercise of their functions, or rather not being an act of such frequent occurrence that the affixing of the corporate seal would be attended with intolerable inconvenience, the waiver would require the authentication of the common seal. 8 T. R. 280; 7 Jurist, 656; Bing. N. C. 265, *et seq.*; *Mayor of Ludlow v. Chalton*.¹ The precedent is taken from Chitty, and he subjoins a *quære*. But further observations now are unnecessary on this part of the case; they will more properly arise when the exceptions to the fifth plea come on to be discussed.

We will now proceed to the demurrers to the pleas. Demurrer to the second plea. This plea is objected to upon the ground of duplicity; that it attempts to put several matters in issue, namely a refusal to deliver in account of loss, and also a refusal to permit extracts, &c. It is certainly a rule in pleading that the issue must be single, but a variety of facts, all constituting one entire proposition or ground of defence, may be pleaded if they be dependent and connected; Chitty on Plead. (1st vol.) 637; and it is another rule equally well established, that wherever it is incumbent upon the plaintiff to aver the performance of several acts, the performance of all or any of these acts may be denied. But it is contended on the other side, that this general traverse has a tendency to multiply the issues; but the remedy proposed, that is to traverse by a separate plea the performance of each act, does not remove, but increases the difficulty.

Again, if the defendants were confined to the traverse of a single act, they would be obliged to admit the performance

¹ 6 M. & W. 815.

of the acts not traversed, upon the principle that whatever is not denied is admitted. As the rules of pleading are founded in good sense and sound reasoning, any system of pleading by which a party is prohibited from putting in issue the performance of an act which the plaintiff ought to prove, seems to be in direct conflict with those rules. Demurrer to the third plea. The object of this plea was merely to put in issue the fact whether the plaintiff were interested in the goods or not; the averment of that interest under this issue would be matter of evidence for the jury. Demurrer to the sixth plea. The arguments already advanced in support of the second plea may be applied in favor of the sixth, and it is not necessary to repeat them again. But this plea may be sustained upon the ground that all the allegations in it, which precede the word nevertheless, are in the nature of a *protestando*, which means an admission — an admission of the facts as therein stated — but not of the legal consequences sought to be attached, or their compliance with the terms required. The issuable part of this plea therefore would be that portion of it which alleges, that the plaintiff did not reasonably prove his loss according to the tenth condition; that is to say, that the proof required by the tenth condition was not furnished by the plaintiff. In this view then the issue is single, or to speak more correctly, the plea tends to produce an issue which would be single. The plea is taken from a precedent in Chitty, and there is no note subjoined suggestive of a doubt of its validity. 1 Chit. Pl. 648, 651. Demurrer to seventh plea. The form of this plea is also given by Chitty; the objection to it is duplicity: 1st, because it denies the delivery of the account of loss; 2dly, because it alleges that "there appears to be fraud in taking the account;" the language of the tenth condition is, "if there appear any fraud, the assured shall forfeit all claim under this policy." Now the material issuable part of this plea is, that there appeared to be fraud in taking the quantity of teas, ribbons, &c. The defendants have been more specific here than the rules of pleading require: a general allegation of fraud would have been quite sufficient. Fraud most generally is a compound of facts and intents, and it never can be necessary to enumerate all the facts and motives which constitute the

crime. 1 Chitty's Plead. 613; 9 Rep. 110; *Hill v. Montagu*.¹ Demurrer to the eighth plea — False swearing. It was not necessary in this plea to state before whom the false swearing took place, as no person had a right by law to administer the oath; in fact it would be unlawful to do so, and the person administering the oath might be liable to a criminal information, and perjury could not be assigned even if the oath were wilfully false. The false swearing which the policy contemplates, is not perjury in the legal acceptance of the term: it intended that the oath should be a statement of the truth according to the party's own knowledge; and therefore we should maintain the position (did it become necessary), that if the plaintiff swore to a state of facts which he believed to be true, and he were mistaken, — for instance, if he chose to swear without due inquiry or certain knowledge as to the value or loss of an article, and he was mistaken, — that would be false swearing within the tenth condition, and would defeat the policy, while at the same time it would not be perjury in law: unless the construction were such, it would give the assured great facilities for the commission of fraud. We contend that the object of this plea is to make the insured use every precaution to give a fair and just account of his loss, not to speculate upon the probability that he may escape detection. The same arguments apply to the demurrer to the ninth plea. Demurrer to the tenth plea. This plea is demurred to upon the same grounds that the third plea is, to which our answer has already been given. Demurrer to the eleventh plea. The objection to this plea is, that it ought to have concluded to the country. It is addressed to the second count of the declaration, which omits the allegations that the loss was estimated; therefore this new material fact having been introduced by the plea, it is rightly concluded with a verification. Then with respect to the fifth plea, the replication to it, the demurrer to that replication, and the exceptions to that plea; these may be all considered together.

The leading exception to the fifth plea is, that it sets up the fifteenth condition as an answer to all the counts of the declaration; and that as the fourth contains an averment of waiver

¹ 2 M. & S. 378.

of the fifteenth condition, the plea being inapplicable to that count, is, therefore, bad in that particular; and being entire, is bad *in toto*. Another ground of exception against the plea is, that the subject matter of it is not pleadable in bar at all; that if the action had not been commenced against the defendants until after the lapse of twelve months from the time the cause of action accrued, this is merely a matter of evidence to be submitted to the jury upon an issue raising the question of loss. Another ground is, that the fifteenth condition is contrary to the policy of the law, and that it is repugnant to the tenth condition. In the first place it becomes necessary to consider the objection that the fifteenth condition is contrary to the policy of the law. The proposition is rather startling. The general rule of the common law certainly is that parties may enter into any kind of contract they please, provided that its object be not immoral, nor have a tendency to wound the feelings of individuals, nor contrary to legislative enactments, or the policy of the common law. In *Mitchell v. Harris*,¹ Lord Chancellor Eldon says, referring to *Halfhide v. Fenning*,² "In that case there was an express agreement that there should be no suit in law or equity. Parties may so agree; and it is every day's practice that if they do, they cannot proceed contrary to the agreement. In that case the covenant would be a bar; here the only effect of it would be to give damages, but could not be pleaded in bar to the action. Has there been any instance of a bill to compel parties to name arbitrators?" Here then we have the very highest authority in favor of the legality of the fifteenth condition, and it is of no consequence what form the contract assumes, whether it be called an agreement, a proviso, stipulation, or condition: the substance of all is the same. The fifteenth condition is a reasonable one also for the defendants to introduce into their policies, as a guard against fraud. The parent institution is situated in a foreign country, at Hartford, in the state of Connecticut, removed to a great distance from the place where the insured property is. The premiums of insurance are very small, and it would certainly be an extremely imprudent act on the part of the defendants to contract a liability, which might be enforced against

¹ 2 Vesey Jun. 129, 132.² 2 Brown's Ch 336.

them after a lapse of fifteen or eighteen years, when accident or death had removed out of the way all the witnesses by whom an available defence might have been proved, if the action had been promptly brought. The exceptions in the statute of limitations apply to natural persons only and not to corporations; they are not locomotive bodies, travelling from one jurisdiction to another, so that the defendants could not protect themselves by a plea of the statute. *Faulkner v. Delaware & Raritan Canal Company*.²

Having established the validity of the fifteenth condition, we pass on to the consideration of the other grounds. This case has been compared to one falling under the statute of limitations, with respect to which it has been decided that there can be no cause of action until there be some person upon whom process can be served. But statutes of limitation or prescription only take away the remedy; they leave the debt or demand untouched. So that courts of law pay no regard to the statute of limitations of a foreign country, and when parties invoke the aid of their jurisdiction, they apply the remedy according to their own forms of proceeding. But in the case of a contract extinguished by the law of the place where made, or by an original term or stipulation in the contract itself, whether by mere lapse of time or otherwise, the law is different; the contract cannot be revived by a suit in a foreign country. Story on Conflict of Laws (2d. ed.) 223. It is contended, on the other side, that although the contract disclosed by the fifteenth condition would be extinguished at Hartford, where it is made or was to be performed, yet, when the remedy is sought here, a different rule ought to prevail. But the law is in direct opposition to this position. Story, J., in his Conflict of Laws, p. 272, says: "The general rule is, that a defence or discharge good by the law of the place where the contract is made or is to be performed, is held to be of equal validity in every other place where the question may come to be litigated." It seems to be admitted on the other side, that if the policies had been made in this province, and the plaintiff had suffered twelve months to elapse after the cause of action arose without commencing an action, the fifteenth condition would have been a

¹ 1 Denio, 441.

bar. Now it is clear the policies were made in this country at the city of Saint John. In *Pattison v. Mills*,¹ before the House of Lords, the Lord Chancellor said: "If I, residing in England, send down my agent to Scotland, and he makes contracts for me there, it is the same as if I myself went there and made them." The same rule has been held to apply even to an English corporation contracting by its agent in Scotland, for the contract takes effect as a contract in Scotland. Story's *Conflict of Laws*, 237; *Albion F. & L. Insurance Company v. Mills*.² Here the defendants, by Mr. Balloch, their agent, made the policies in the city of Saint John. The plaintiff says he could not bring an action; in other words, he could not prevent the lapse of twelve months, the running of time against him, as the defendants resided out of the jurisdiction of the court; but surely there is nothing in this argument; he might have sued out a writ at any time after his cause of action accrued, and thus have commenced his action, or he might have taken proceedings in the courts of the country where the company is incorporated, within the term prescribed. He also takes another ground, that the fifteenth condition is repugnant to the tenth condition; but to this the answer is plain: the fifteenth and tenth conditions must be read together, or with reference to each other, and the obvious interpretation of both is, that as soon as possible after the fire, and before the expiration of twelve months after the loss, the assured is to deliver in a particular account of such loss or damage, &c. The stipulation that no action shall be brought after the lapse of twelve months from the time the cause of action accrues, overrides this portion of the tenth condition, and limits the construction to the period referred to in the tenth. Then with respect to the averment of waiver set out in the fourth count. Before discussing the doctrine upon this point, the nature of the stipulations in the tenth and fifteenth conditions may be briefly adverted to. Those contained in the tenth condition are conditions precedent, that in the fifteenth is a condition subsequent; it therefore becomes the subject of a plea or matter of defence. The plea in such a case would necessarily admit, that the plaintiff once had a cause of action which was well founded, but which

¹ 1 Dow & C. 342.² 3 Wilson & Shaw, 218, 233, 234.

had since been divested by lapse of time. *Hotham v. The East India Company*.¹ It therefore became unnecessary for the plaintiff to notice in his declaration the fifteenth condition, and it is difficult to see how with propriety he could make any allegation respecting it, but he has thought proper to do so. He alleges that the defendants waived the performance by the plaintiff of the fifteenth condition, and that as the defendants have not traversed the allegation, they have admitted the truth of it, and that the fifth plea having been pleaded to the whole declaration, which makes it applicable to the fourth count in which the allegation of waiver is contained, the whole plea is bad. The rule is this: whatever is traversable and not traversed, is admitted. *Hudson v. Jones*, note to *Pim v. Grazebrook*.² This allegation of waiver in the fourth count is mere surplusage, extraneous matter, and not traversable, therefore the defendants were justified in leaving it unnoticed — they were compelled to pass it by. This new fangled doctrine of waiver, as Chief Baron Joy, in the case of *Donnelly v. Howie*,³ in the Irish exchequer, calls it, is comparatively of modern date, and even as applied to the indorsers of promissory notes and bills of exchange, as dispensing with the necessity of presentment or notice of dishonor, is latterly going out of fashion. *Campbell v. Webster*.⁴ What were the defendants to waive in this case? The waiver of preliminary proof in a marine policy is an event of frequent occurrence, and may be either express or implied; it is always of an act or acts the plaintiff is bound to perform prior to his cause of action attaching — something in the shape of a condition precedent. But the question again recurs, what act was the plaintiff here obliged to do, the performance of which the defendants waived? There was no compulsion upon the plaintiff to bring his action within twelve months, or at any time. It is impossible to imagine in what form an instrument of waiver in this case could be conceived — what would be the language of it. No man can describe it. The cause of action was extinguished by lapse of time. How could it be revived by waiver? The only possible way in which the object could be achieved would be this: the

¹ 1 T. R. 638.² 2 C. B. 444.³ 2 Irish Law Rec. N. S. 79.⁴ 2 C. B. 258.

defendants might enter into a covenant with the plaintiff, that if he should bring an action on these policies after the lapse of twelve months after the cause of action arose, they (the defendants) would not plead thereto the fifteenth condition. If, under such circumstances, an action were brought, and the fifteenth condition pleaded, then this covenant might be replied by way of estoppel. It seems, then, that the allegation of waiver in the fourth count was mere surplusage; that the defendants were not bound to answer it, and that the fifteenth condition set up as a bar in the fifth plea to all the counts was properly pleaded. The result therefore is, that the fifth plea, which is pleaded to all the counts, would entitle the defendants to a general judgment on the whole record.

Jack, in reply.

Cur. adv. vult.

CHIPMAN, C. J., now delivered the judgment of the court. This is an action for breach of covenant upon two policies of insurance, made under the corporate seal of the defendants. The one, dated the 27th January, 1845, whereby for the premium therein mentioned the defendants covenanted to insure the plaintiff against loss by fire to the amount of \$4,000, on his general stock of merchandise as therein stated, from 27th January, 1845, unto 27th January, 1846, and in case of loss the amount to be ascertained according to the true value of the goods at the time of the loss, and to be paid by the defendants within sixty days after notice and proof thereof made by the assured, in conformity to the conditions annexed to the policy. This policy was indorsed by the defendants on the 13th May, 1845, whereby they consented that it should cover merchandise either owned by the plaintiff, consigned to him on commission, or in trust; and that the loss, if any, was to be made payable to the order of Augustus W. Whipple. The other policy, made under the seal of the said defendants to the plaintiff, was dated the 13th May, 1845, and was also for \$4,000, in addition to the previous policy against fire on the general stock of goods, &c., of the plaintiff, either owned by him, consigned to him on commission, or in trust, contained in the building therein mentioned in Saint John, from the said 13th May, 1845, to the 13th November then next. The other terms of the policy are the

same as the first mentioned, with the same reference to the conditions annexed thereto. This policy was also indorsed by the defendants, whereby it was declared by the defendants that the loss, if any, was to be payable to the order of the said Augustus W. Whipple. Objections to the declaration. The declaration contains five special counts, in each of which both policies are declared on, and in the first of which the conditions annexed to the policies are set out in full, and it is therein alleged that the said policies were made "and accepted in reference to the conditions thereto annexed, which were to be used and resorted to in order to explain the rights and obligations of the parties thereto in all cases not therein otherwise specially provided for;" and it is alleged in each of the other counts that the policies therein set forth were made with reference to the same terms and conditions annexed, as in the first count is mentioned. Thus the plaintiff has by his own showing made the conditions in question part of the policies, just as if they were included in the instruments, and is estopped by his own declaration from now contending that they are mere matters of form, not intended as part of the contract; and he was bound so to declare, and to set out those conditions as part of the contract, as they are necessary, having the effect of explaining and controlling the terms of the covenants contained in the deed, and the doctrine laid down in the case of *Worsley v. Wood*¹ clearly makes them part of the deed. This being so, and several exceptions having been taken to each of the counts in the declaration, as not containing sufficient averments to show the plaintiff's right to recover, we will first dispose of these exceptions. In order to do this it will be necessary to advert to the conditions, to see what is required of the plaintiff (in case of loss) to give him the right of action; for it is clear that he must show by his declaration that he has fulfilled all conditions that are precedent to that right. In the first place, he has in all the counts shown the deeds in full with the conditions, and has averred the loss by fire, the interest in the goods destroyed, and the amount of the loss, together with sundry other averments, which we shall hereafter advert to in reference to the exceptions taken. The first exception to each of the

¹ 6 T. R. 710.

counts is, that he has not averred that Whipple gave any order for the payment of the loss, and it is contended that, under the terms of the indorsement on the policies, the defendants were not bound to pay any loss without Whipple's order; but the plaintiff has, in the breach assigned to each count alleged that the defendants had neither paid him the loss, or replaced the goods, &c., or paid the same to Augustus W. Whipple; and in the first and third counts it is added, "or to his order," but in the second, fourth, and fifth counts, the words, "or to his order" in the assignment of the breach are left out; but there is no objection taken to the assignment of the breach in either count; it is only for the want of an averment that Whipple gave an order; and on this point we are clearly of opinion that this averment was not necessary. Whipple was no party to, nor was his name mentioned in the contract. He could maintain no action except as assignee, and no assignment of the policies to Whipple is alleged; consequently he could have no legal right to recover in his own name the money insured, and there is nothing in the record to show that he had any legal interest in the property insured; the indorsement amounts only to a consent on the part of the defendants that the loss (if any) might be made payable to Whipple's order; but if Whipple gave no order, and never had any right transferred to him by the plaintiff to do so, then the loss still remained payable under the contract to the plaintiff, and therefore we think there is nothing in this exception. If the defendants had paid Whipple, that fact might have been a good answer to the present action, and so pleaded by the defendants. As to the second exception, "that it does not appear that the plaintiff was interested in the goods destroyed at the time of the loss, or that he had sustained any injury by the fire." This was not much urged by the defendants' counsel, and we think there was nothing in it, and the interest is sufficiently averred in all the counts. The third exception to the first count is, that the plaintiff has not shown that at the time he delivered in his particular account in writing of his loss, he also delivered in the other declaration and proof required by the tenth condition; contending that they should all have been delivered in at one time, or it should have been averred that the proofs were delivered in within a reasonable

time, and as soon as possible, and some reason shown for delay. Now all the tenth condition requires as to time is that notice of the loss shall be forthwith given, and that, it is averred, was done; and all that the condition afterwards requires to be done is merely that it should be done as soon after the notice as possible, and the plaintiff avers that "as soon after as possible," that is, on the 20th August, he did deliver in a particular account of the loss under oath, and did after the said fire, according to the said condition, that is, on the 27th March, 1846, do all the other acts that the tenth condition requires to be done by the assured, — detailing what he did in compliance therewith *primâ facie* to make the loss payable; and as this is not required to be done within any specified time, we think this objection cannot be sustained. The next and fourth objection is, that it does not appear that Scovil, the notary who gave the certificate, was not related to Whipple; but this is answered by there being nothing to show that Whipple was in any way interested in the insurance. The next objection, which is the fifth in number, is already disposed of in our remarks on the third; the performance of such parts of the tenth condition as are only required to be done on request need not be averred by the plaintiff in the declaration. As to the sixth objection to the first count, that it does not appear that the action was commenced within the term of twelve months next after the cause of action accrued. On this point we are clearly of opinion it was not necessary that the plaintiff in his declaration should show this, and that it is a matter of defence for the defendants to plead. This indeed was admitted by the defendants' counsel, Mr. Chandler, in argument, on the authority of *Hotham v. The East India Company*; ¹ for the fifteenth condition is clearly a condition subsequent, and the right of action having once fairly vested, it could only be divested under this condition by subsequent lapse of time, and therefore becomes a matter of defence; *primâ facie*, however, it would seem by this count that the action was brought within the twelve months; for the declaration is entitled of Hilary term, 1847, and it is alleged that the proofs were furnished in March, 1846, and sixty days from that time would have to elapse before action could be brought; for we think it clear that the twelve months do not

¹ 1 T. R. 638.

begin to run until the right of action accrues, and that it is only after the expiration of sixty days from time of proof. There is nothing in the seventh objection. As to the objections to the second count of the declaration, the first and second are disposed of by the decision on the objection to the first count. As to the third objection to the second count: supposing this objection to be right, that the averment objected to is immaterial, yet that would not make the count bad in substance, as it shows no defect in the plaintiff's right of action; and if it is immaterial, the defendants should not traverse it in their plea, and it might be struck out as surplusage, and yet the count be good; and therefore the objection cannot avail. The fourth objection to this count is, that the plaintiff has not shown how the defendants waived the performance by the plaintiff of that part of the tenth condition therein alleged to have been waived; but we think this averment is well enough, and it is a fact to be proved before a jury, and if the evidence does not make out such a waiver in law as will bind the defendants in such a case, then the plaintiff would fail in establishing this very material allegation. In cases of insurance, a waiver of certain preliminary proofs required by the strict letter of the condition may be effected by acts of the assurers even without a deed under seal; a train of circumstances may amount to such a waiver, so as to release the assured from the necessity of procuring such proof; this is shown in *Phillips on Insurance*. As to the fifth objection to this count, it appears to us that the plaintiff has averred performance of all the other parts of the tenth condition that he was required to perform (except so much as he said was waived); and if so, this objection is not sustainable.

The sixth objection to the second count does not sufficiently point out in what respect the acts therein mentioned are not in accordance with the tenth condition, nor did the counsel in argument show this. We do not see anything to sustain this point. No further observations are necessary as to the other objections to this count, which, where not immaterial, are already answered. As to the objections to the third count, some questions might possibly arise whether the averment of the performance of the conditions precedent are sufficiently particular, but we deem it unnecessary to examine it very minutely: the

case does not turn on it, and all we need say now is, that we are not satisfied as to the validity of this one objection, and the others have been already disposed of. There is only one other objection indeed to the declaration which we deem it material to dwell on, and that is certainly an important one: it is that to the fourth count, which applies to the alleged waiver of the fifteenth condition. The averment itself we consider quite an unnecessary one for the plaintiff to have made in his declaration — there is no admission to render it necessary except that implied from the averment itself. It has been inserted in one count only, and we will not say imprudently, as the plaintiff might not be quite sure from what time the twelve months would be held to run; and if aware that the objection existed and would be insisted on, might think it as well to anticipate it himself, and meet it in one of the counts. The fifteenth condition is as follows: "It is furthermore hereby expressly provided, that no suit or action of any kind against said company for the recovery of any claim upon, under, or by virtue of this policy, shall be sustainable in any court of law or chancery unless such suit or action shall be commenced within the term of twelve months next after the cause of action shall accrue; and in case any such suit or action shall be commenced against said company after the expiration of twelve months next after the cause of action shall have accrued, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced." Thinking as we do that the cause of action did not accrue until the alleged default in payment was committed by the defendants, — namely, at the end of sixty days after the fulfilment of the precedent requisites of the tenth condition, — it would not appear by the other allegations of the count that the action was brought after the year. The declaration is entitled of Hilary term, 1847, which is within twelve months of the time when the proofs required by the tenth condition are alleged to have been presented, which is stated as the 27th day of March, 1846. It is true this day is alleged under a *videlicet*, and the plaintiff would not be tied down to proving the exact day, but still there is nothing in the count to render an averment of the waiver necessary, and we have great doubts whether the averment itself

is not immaterial. The averment is in the following terms: "And the said plaintiff avers that afterwards, to wit, on the day and year last aforesaid (which was on the 27th March, 1846), to wit, at, &c., the said defendants waived and discharged the said plaintiff from the performance and observance of and compliance with the fifteenth condition, number fifteen, annexed and referred to respectively by the said policies in this count mentioned." Although it is there alleged that the defendants waived the compliance with the fifteenth condition, it does not appear in the declaration that the plaintiff was under the necessity of availing himself of the waiver, though the plaintiff was of course aware thereof, and that it would so appear in his evidence. The averment seems indeed put in for the purpose of meeting a defence which the plaintiff might have been apprehensive would be relied on, without distinctly pleading this condition, on other issues not referring to it; for instance, on an issue involving the question of loss or no loss by fire within the terms of the policy, part of the condition being that in case of action brought after the expiration of the twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. Indeed it is one part of the plaintiff's own argument, that the fifteenth condition was not pleadable in bar, but only matter of evidence as to the validity of the claim. It may be, but we are not informed on the point, that the strict rules of the English courts in regard to the division of actions and the pleadings therein, especially in actions of covenant, do not prevail to the same extent in Connecticut, where the company was incorporated, or in other states or places where these policies might be put in suit, which may account for the peculiar terms of the condition just recited. The plaintiff, however, having made such an averment, whether necessary or not, it would seem to follow that the defendants might traverse it, and that an issue joined thereon, if found for the defendants, would defeat the action on this count, on the rule, that though the issue be immaterial, yet a repleader would not be granted in favor of the plaintiff who chose to insert such an averment in his count. Steph. on Pl. 110. "The court never grants a repleader in favor of the person who made the first

fault in pleading." On this question, however, or any which might arise as to a judgment *non obstante veredicto*, it is unnecessary to enter further, as we are all of opinion that if the action was not brought until after the expiration of twelve months (in which case only, looking at the whole declaration, the point would be material to the result of the action, brought up as it is in the proper way by one of the defendants' pleas), the averment of waiver is quite insufficient to take the case out of the operation of the fifteenth condition. The condition is evidently a condition subsequent, not precedent, operating by way of defeasance (going to defeat a cause of action once existing); and notwithstanding the words in the latter part of it, declaring that the lapse of time shall be deemed conclusive evidence against the validity of a claim sought to be enforced after the expiration of the twelve months, we are clearly of opinion that in an action of covenant at least the bar should be pleaded. It is true that the condition is evidently framed with a view to a more effectual operation than that produced by the statute of limitations, which is held to bar the remedy only, not the debt; not to extinguish the plaintiff's right of action, but merely to suspend it; which may be the reason that advantage can only be taken of the statute of pleading specially, although there be a general issue, and it appears on the face of the declaration that the action was not brought within due time. How it might be if a similar condition were annexed to a policy not under seal, on which assumpsit might be brought, and where the defendants might plead the general issue, — whether the defendants could have the benefit of this condition upon the general issue as conclusive evidence against the validity of the claim, — we are not called on to determine, as in the case before us there is and could be no general issue, and every matter in bar must be specially pleaded. The objection, we feel, is not merely one of form but of substance. If the plaintiff could in any manner avail himself in pleading of a waiver of the condition, he would be bound in his averment to show how and when such waiver was made, and that in the manner alleged it was binding on the defendants. The averment of dispensation with a condition subsequent by way of waiver, is something new to us in pleading, for which no pre-

cedent has been cited. It is true we find the expression in familiar use that the defendant has waived the defence given by the statute of limitations, where the statute is pleaded and a subsequent promise proved; but we have never met with the term in any form of declaration or replication in order to take the case out of the statute. If the demand or undertaking *prima facie* barred by the statute of limitations be revived, by a new promise in assumpsit or debt on simple contract, it is not necessary or usual to reply the new promise, but to rely on it as reviving the old; and all the other forms of replication to the statute go to show the case to be within one of the exceptions, or that the action was brought within the proper time. By the old statute of limitations there was no limit prescribed for an action on a specialty, but in the present English statute for the further amendment of the law, 3 & 4 Wm. 4, c. 42 (and in our Act of Assembly, 6 Wm. 4, c. 51), where the time for bringing such actions is limited to twenty years, with a proviso that in case of written acknowledgment, &c., the action might be maintained within twenty years after such acknowledgment, it is enacted that such acknowledgment might be stated by way of replication; that is, the plaintiff sets out the acknowledgment relied on as an answer to the statute when the statute is pleaded. We cannot understand in what manner a waiver, properly speaking, of the fifteenth condition could be made except by not pleading it; and if the defendants have given any binding undertaking not to take advantage of the condition, if it was not of such a nature as to revive the original covenant, we do not see how such undertaking could avail except by way of motion to set aside a plea of the fifteenth condition, on the ground of fraud, or by way of action for the breach of it. If however it could avail in this action as a dispensation of that condition, without doubt the proper mode of setting it up would be by way of replication when the condition was pleaded. How after the expiration of the twelve months, if the bringing the action was not delayed by any fault of the defendants or unavoidable cause, the defendants (a corporation) could be held liable unless by some new instrument under seal, of which profert should be made, is not very apparent; but if so, the when and how should appear on the record. We

do not wish it to be understood as our opinion, that the plaintiff might not and ought not to have alleged in his declaration any valid contract or obligation, if any such were made, whereby the defendants agreed to hold themselves liable to an action on the policies, though brought after the twelve months, notwithstanding the terms of the fifteenth condition; without doubt, if any such contract or obligation was made in reference to the former contracts on the policies, the whole might form one cause of action, and be properly declared on as such; but the objection is, that the declaration sets out no binding contracts as the cause of action, but the policies themselves with the conditions thereto appended. The averment is therefore insufficient or superfluous. If the former, and it be essential, the count is bad. If either insufficient or superfluous, we do not on consideration see that it could prevent the defendants from setting up the fifteenth condition as a plea to this as well as the other counts, if the condition itself be binding; this point however, more properly arises on the special demurrer to the replication to the fifth plea, where the objection is taken to the plea on this ground.

As to the argument that was used by the plaintiff's counsel, that the fifteenth condition is against the policy of the law, and therefore not binding, this can never be sustained. There are many and good reasons, in cases of insurance against fire, why the assurers should introduce such a condition into their policies; they are always liable to fraud being practised upon them, and it is very often extremely difficult to detect the fraud, or to get evidence to substantiate it in a court of justice, and the greater the lapse of time the more difficult would that be. If there is no dispute, the assured is entitled to the amount of his loss immediately it becomes payable. If there is a dispute, and he lays by for more than a year after his right of action accrues without commencing a suit, that in itself would in the minds of the assurers create a strong suspicion that something was wrong, and that the assured was fearful of trying the question while all the circumstances were fresh in the recollection of witnesses, or while witnesses were on the spot and could be had; we therefore think it a wise and provident precaution to take — such as the assurers are legally justified in — to limit in

the terms of their policies the time within which actions shall be brought, as a necessary protection to themselves against fraud; and they have as much right to make such a stipulation as the terms upon which only they will take the risk, as they have to introduce any other condition, for the contract is voluntary, and they have a clear right to stipulate their own terms. Another argument used against the binding effect of the condition was, that the defendants are a foreign company, and the printed conditions are merely applicable to their own country, and can be put in force only by their own courts of justice, but are not binding here, if contrary to the policy of our laws; but this is a fallacious argument, and founded upon false premises. In the first place, the record does not establish in which country the policy was made; some of the counts allege it to have been made in Saint John, and some in a foreign country, but in which country it was actually made is not shown. Nor do we think it can make the slightest difference in this case, unless it could have been clearly shown that it was made in a foreign country, and that the laws of that country in respect to its operation were different from ours, and that by the laws of that country this condition was held not binding. In that case there might have been something in the argument, but as nothing of that kind was shown or pretended, we must look at it as if made in Saint John by an agent of the company; and if so, we must deal with it in every respect as if both parties were British subjects contracting in this province. In this view of the case, then, we are of opinion, if the fourth count be not bad on account of the insufficiency of the averment in regard to the fifteenth condition, the defendants were not bound to traverse this averment, but might, notwithstanding the averment, plead thereto the bar arising on that condition.

Fifth plea and replication thereto. Having gone through the exceptions taken to the different counts in the declaration and disposed of them, we will advert to the defendants' fifth plea, the replication thereto, the demurrer to that replication, and the exceptions taken to the plea in answer to the demurrer; for if the fifth plea is good, and is not sufficiently answered by the replication, it is a complete bar to the whole action, and judgment for the defendants on this plea will dispose of the whole,

and make it unnecessary to go through all the various points raised on the other pleas, except as to the question of costs. The fifth plea is to the whole declaration, and in substance sets up the fifteenth condition of the policy as a bar to the action; that is, it first sets out the fifteenth condition, and then goes on to say that the said several supposed causes of action (if any) did not, nor did any of them, accrue to the plaintiff at any time within the term of twelve months next before the exhibiting the bill of the said plaintiff against the said defendants, &c. Now if, on the view we have taken of the fifteenth condition, this plea stands good, and not sufficiently traversed or avoided, it is a clear bar to the plaintiff's recovery. Then let us see what are the objections taken by the plaintiff to this plea. The first is, that it is to the whole declaration, and has not traversed the averment in the fourth count, that the defendants waived the fifteenth condition here set up as a bar to the action; and there is no doubt this objection would be good if that averment in the fourth count could be sustained, but for the reason we have already stated this objection fails. The second objection is predicated altogether upon the construction of the fifteenth condition contended for by the plaintiff's counsel in the argument; that is, that it applies only to actions brought in any court in the foreign state where the policy was made, and is already answered. The third objection is, that the fifteenth condition does not amount to an estoppel to bringing the action, but is merely a matter of evidence for a jury against the plaintiff that no loss has been sustained; but we think it clearly pleadable as an effectual bar to the action itself, as much so as the statute of limitations is in any case. The fourth objection is founded upon the allegation in the second count of the declaration, that there was no person representing the defendants in this province upon whom process could have been served, which not being traversed by the plea is admitted; but this admission does not show any reason or cause whatever why the plaintiff could not commence his action, and have continued it until the defendants did appear, for until the action was commenced they had nothing to appear to; and as the second count alleges the contract to have been made in the foreign state where the defendants are incorporated, there is

nothing to show why the plaintiff should not have sued them there within the time, and if they would be protected there where the contract was made, by the condition after the lapse of time, they would be equally so here. The fifth, sixth, seventh, ninth, tenth, and twelfth objections require no further remarks; they cannot be sustained. The eighth objection is founded on the voluntary appearance of the defendants to this action, which it is contended estops them from pleading the lapse of time, after admitting (by not traversing) the allegation in the second count, of there being no one in this province upon whom process could be served for the defendants; but nothing can be made of this. The eleventh objection is, that the plea should have stated that the cause of action did not accrue within a year before the commencement of the action, and not before the exhibiting of his bill; but there is clearly nothing in this — the exhibiting the bill is on the record *prima facie* the commencement of the action, but where time is material the plaintiff may reply the process issued before the first day, or the defendants might show process issued after the first day of the term, and have a special entry on the record to that effect; we are therefore of opinion that the plea is good. And this brings us to the replication of the plaintiff to this plea, and the demurrer thereto. This replication commences by an admission in fact, that the action was not brought until after the expiration of twelve months from the time of the causes of the action accruing as stated in the plea, and it then goes on to allege that no action could have been sustained within the twelve months against the defendants, unless the defendants had voluntarily appeared, they being all the time a foreign corporation, having no person in this province upon whom service of process could have been made, and there being no means by which the defendants could have been brought into court; the plaintiff then avers, that although he was ready and willing to have prosecuted his claim within the twelve months, yet the defendants refused to appear, by means whereof no action could have been sustained. The plain answer to this replication is, that the premises do not warrant the conclusion drawn from them, or that the conclusion is not sufficient. Notwithstanding all that is alleged, process might have been issued

within the twelve months and duly returned, which would have been a commencement of the action in this province ; whether duly served or not was nothing to the purpose. The plaintiff could never have contemplated maintaining this action and recovering in this province, unless the defendants consented to appear. This replication, therefore, we think bad on this ground alone, independent of the other grounds of demurrer taken, and if so, and the plea stands goods, judgment must be for the defendants upon this demurrer. In which case, as we have before observed, it is only necessary to go into the questions arising upon the other pleas as a matter of costs, as it seems to have been admitted on both sides that the action was not commenced within time, according to the fifteenth condition, and if so, the plaintiff could not get rid of the difficulty by any amendment he could make. We will, however, state the opinion we have formed on the other pleas and demurrers, on the best consideration we have been enabled to give to them.

Demurrers to defendants' pleas — As to second plea : The defendants in this plea to the whole declaration say that after the fire, that is, on the 26th August, 1845, the plaintiff was required by the defendants to deliver in an account in writing under his hand, verified by his oath, and by his books of accounts, and other proper vouchers, and to permit extracts and copies to be taken respecting the loss, but the plaintiff neglected and refused so to do. Now the plaintiff in his declaration has not averred in any of the counts, that he verified the account he delivered in of his loss by his books of accounts and other proper vouchers, or that he permitted extracts and copies to be made, because this was not a necessary averment for him to make in the first instance, the tenth condition only requiring such proof to be furnished in case it should be required, and therefore the neglect or refusal of it in such a case made it a matter of defence to be pleaded ; and this is just the course the defendants have pursued. But the plaintiff, by his demurrer, says the plea is double, because it puts in issue two facts : first, that he refused to deliver the accounts, &c. ; and secondly, that he refused to permit extracts, &c., to be taken from the books. But these are only two facts tending to es-

tablish the same one point — the second follows from the first, and what do they both amount to? Why, that the plaintiff has not, although requested, performed that part of the tenth condition which he was bound to do if requested, namely, to deliver in an account, verified by his books of accounts, and other vouchers, and permit copies and extracts of such books and vouchers to be taken. The plaintiff might, if he pleased, have traversed the whole request as broadly as it is laid, and the defendants would be bound to prove it; or the plaintiff might plead performance of what it is alleged he was requested to do, and the proof would be on him. If the proof in both cases lay on the defendants, there might be some reason in the objection, but not as the matter stands. Suppose the request were put in two pleas instead of one, the finding of an issue on either in favor of the defendants would defeat the action; but the finding of one for the plaintiff would not be important, if the other was found against him. True, he might have different issues on the two pleas: he might plead performance as to the verification of his account by his books and vouchers, and traverse the request to permit copies and extracts; but this would impose a less burden of proof on the defendants than is now done; and would be rather advantageous to the defendants than otherwise. The permitting copies and extracts to be made seems so intimately connected with the exhibition of the books and vouchers by way of preliminary proof, that we can hardly suppose one would be required and the other omitted, or one performed and the other refused; they appear to us properly to form the matter of one plea, and the plea therefore not objectionable on the ground of duplicity. We think, also, there is nothing in the second ground of demurrer, as the requirement is alleged to have been made after the fire, with a day and place mentioned when and where the request was made, under a *videlicet*, which is according to the form of such a plea, given in Chitty. The third, fourth, fifth, and sixth grounds of demurrer appear to us equally unsustainable, as not founded upon any precedent or authority in pleading. We therefore think this plea is good, and judgment should be for the defendants on this demurrer. As to the third plea, which is also to the whole declaration, it is simply that the plaintiff

was not interested in the goods, &c., insured to the whole amount insured thereon, and we think this plea bad in not adding after the words to the amount of "moneys insured thereon," the words "or any part thereof," for if the plaintiff was interested in any part of the goods insured, he was entitled to recover to the amount of loss he sustained by virtue of such interest. The traverse, therefore, by this plea is clearly too large, and is in fact immaterial; and therefore we think that judgment should be for the plaintiff on this demurrer. As to the sixth, thirteenth, eighteenth, twenty-fifth, and thirty-first pleas, pleaded respectively to the first, second, third, fourth, and fifth counts of the declaration separately, they are all similar to each other, and the questions arising on the demurrers to each of them are the same, and the decision of one will govern all. The first count in the declaration avers a performance by the plaintiff of all the acts (stated in detail) which the tenth condition requires to be performed by the plaintiff to give him a right of action, without any request by the defendants; and the sixth plea, which is to this count, in the first place traverses the performance of all those acts, detailing them in the very language of the declaration; and this is contended by the plaintiff, in support of the first ground of demurrer, to be duplicity, because a traverse of any one of those acts would be in itself an answer to the action, the plaintiff being bound to perform the whole to give him the right. Now this is true; but what is the main point that all those separate acts are to establish? It is the right of action by a fulfilment of the tenth condition. The defendants say to plaintiff, You are bound to perform all the acts which the tenth condition requires, and our defence is, you have not done any of them; but as this is an action of covenant under seal, we cannot plead the general issue as in other actions, and so put the whole at issue; but we have a right to say, by traversing them in detail, you have not performed any of them, by which we will put you to prove them all. And this the defendants have a clear right to do; for if they pleaded the non-performance of only one or two of those acts, they would admit, by such a plea, the performance of all the rest, and their defence would then turn only upon the performance of those one or two acts, when in fact the plaintiff is

bound to show that he has performed the whole before he brings his action. And it is no answer to say, the defendant may traverse them all separately in separate pleas, for by the common law, he is not entitled to plead several pleas; it is only under the statute this right is given, and then only with the leave of the court; but at common law the defendants have a right to put in issue by the same plea everything that is necessary to the plaintiff's *prima facie* right of action, which in other actions the plea of the general issue does, but in covenant, as there is no general issue admissible, the defendants must separately traverse all the allegations in the plaintiff's declaration which are requisite to show their right, if they mean to put them all in issue. We at first had some doubts on looking at this plea, whether the objection for duplicity was not sustainable, but on looking into the authorities we incline to think it is not. The defendants then, after traversing all the allegations in the first count of the declaration as to the performance of the tenth condition, go on to state that although the plaintiff did deliver in an account and declaration on oath, and a certificate of Scovil, yet he did not duly, properly, or reasonably prove his loss, &c., according to the tenth condition; and this the plaintiff contends, in the second ground of demurrer, is ambiguous, as it does not show in what respect the proof was defective; but the defendants have, in the previous part of the plea, in express terms, denied in the language of the condition itself, that the plaintiff delivered in such an account, declaration, and certificate as that condition requires, and the subsequent part of the plea merely amounts to an admission that some account, declaration, and certificate were delivered, but not conformable thereto; and this raises the question to be tried, whether they were according to that condition or not, upon which there is nothing to prevent the plaintiff taking issue. If indeed the plaintiff was at liberty to reply a waiver or other excuse for not performing any of these particulars required by the tenth condition as preliminary to the action, there might be some reason for separate pleas, but as he alleges performance of the whole, a waiver or excuse of any part would be a departure, and vitiate a replication.

The form of the plea is certainly singular, but it is copied

exactly from Chitty, and when examined seems free from the objection taken; we think, therefore, the judgment should be for the defendants on this demurrer, and also on the demurrer to the thirteenth, eighteenth, twenty-fifth, and thirty-first pleas. Then as to the seventh, fourteenth, nineteenth, twenty-sixth, and thirty-second pleas, pleaded respectively to the first, second, third, fourth, and fifth counts of the declaration separately, they being all the same, the decision upon the demurrer to one will dispose of all. The ground of demurrer is duplicity, in this, that it first traverses the allegation in the declaration of the delivery of the account of loss; second, it also sets up fraud; either of which would be a good defence; but the gist and point of this plea is fraud only, and the traverse of the delivery of the account of loss is in conjunction with and in support of the charge of fraud; for this allegation in the declaration is intended to show a compliance in that respect with that part of the tenth condition. Now, the account required by that condition is a true and correct account, and if there is any fraud in taking it, it is not a delivery of an account, according to the terms of that condition. If therefore the defendants had not traversed that allegation in the declaration in order to set up fraud, it would have stood as admitted in the pleadings, that the plaintiff had complied with that part of the condition, which would have been inconsistent with the subsequent part of the plea alleging fraud in making up that account. The defendants therefore have very properly traversed the delivery of such an account as is alleged in the declaration, which they explain by saying that in the claim made for the loss by the plaintiff, there appeared fraud in taking the account, &c., within the true intent and meaning of the tenth condition; and this plea agrees with the forms given in Chitty, although it is true no case has been cited, nor can we find any, where these particular forms have undergone any judicial investigation. As to the eighth plea, which alleges false swearing in the declaration made by the plaintiff on oath, to wit, in the statement A, annexed to the declaration, without expressly averring that any such statement was annexed, or saying when, where, and before whom the oath was made, or in what particular part of the statement; we think, to say the least, that it is so very doubtful, that we are

not prepared to pronounce in its favor; probably had it been material, we should have suggested an amendment, as the defects are all such as could probably have been supplied; as now advised, our judgment will be for the plaintiff on the demurrer to this plea, and also on the demurrer to the sixteenth, twenty-fourth, twenty-eighth, and thirty-fourth pleas, which are similar. For the same or similar reasons, the ninth, fifteenth, twentieth, twenty-seventh, and thirty-third pleas are objectionable, and our judgment also must be for the plaintiff on the several demurrers to these pleas. The tenth, seventeenth, twenty-second, and twenty-ninth pleas, pleaded respectively to the first, second, third, fourth, and fifth counts separately, are, we are clearly of opinion, all bad, for the reasons mentioned in the first ground taken in support of the respective demurrers to these pleas. The issue tendered by each is certainly too large, and does not go to the whole cause of action, but merely to the amount of the plaintiff's loss, which is a matter of evidence for a jury, and though the plaintiff may not have sustained a loss to the extent alleged in the declaration, yet he is entitled to recover to the extent he may prove; and therefore we think judgment must be for the plaintiff on these demurrers also. This disposes of all the demurrers to the several pleas, and the result is, that judgment will be entered for the plaintiff on the demurrers to the third, eighth, ninth, tenth, eleventh, fifteenth, sixteenth, seventeenth, twentieth, twenty-first, twenty-second, twenty-seventh, twenty-eighth, twenty-ninth, thirty-third, and thirty-fourth pleas; and for the defendants on the demurrers to the second, sixth, seventh, thirteenth, fourteenth, eighteenth, nineteenth, twenty-fifth, twenty-sixth, thirty-first, and thirty-second pleas. This case, which has been argued on both sides with much ability, and we may add also with much precision and conciseness, has presented a number of points on a very interesting subject, in regard to which there are many similar contracts continually entered into in this and other countries. It is therefore of great importance in its general result, as well as in its effect on the present claim. It may serve, and we hope it will, to draw attention to the very particular clauses and conditions contained in fire insurance policies, which are often not thought of until a case arises which calls them into action. We should have felt much aided had

any decision occurred or been brought under our notice, where similar questions had come under discussion in any of the courts of the United States, as those courts generally are governed by the same principles of pleading and evidence as ours are. The point on which the case mainly rests, namely, as to the time in which the action must be brought, seems to us abundantly clear. There may perhaps be doubts as to some of the other points, to which, had the validity of the claim depended on them, we might have thought a longer consideration advisable; but we have not felt justified in delaying our judgment when we are satisfied the action cannot be supported, especially as there are several issues in fact on the record, the trial of which is thereby rendered unnecessary.

JAMES C. MOORE *et al.* vs. PROTECTION INSURANCE COMPANY.¹

(Supreme Court, Maine, June Term, 1848.)

Examination of Assured. — Increase of Risk. — Evidence.

Where it was made a condition of a policy of insurance, that in case of loss, the assured shall, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; if such examination be once made and completed, the assured cannot be required by the company to submit to a further examination under oath afterwards, although at the time of making the oath he may have assented to a further and future examination.

Where, in a policy insuring a stock of dry goods, it is provided that the policy shall be void, if the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring; and among the articles denominated hazardous is cotton in bales; — yet if cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy, unless the jury should find that keeping of such cotton increases the risk.

Where, in a policy upon a store and stock of dry goods, one of the conditions protected the insurers against the appropriating, applying or using the store for keeping or storing goods of a hazardous character: *Held*, that the keeping of a hazardous article for sale among the other goods was not an infraction of that condition. Such a condition is merely a protection against appropriating the store for a depository of such goods, as a sole principal business.

The affidavit of the assured, made in pursuance of the requirements of the policy, and his examination before the company's agent, after being introduced into court without ob-

¹ 29 Maine, 97.

Examination of Assured. — Increase of Risk. — Evidence.

jection, are proper evidence for the consideration of the jury as to the amount of the loss.

The fact that the assured in his affidavit estimated the value of the goods consumed at \$2,800, and the jury returned a verdict for \$1,853 only, is not such evidence of fraud and false swearing as would justify the court in granting a new trial.

TENNEY, J. The plaintiffs procured "three thousand dollars on their stock in trade, consisting of dry goods, kept in a frame store, occupied by themselves in Belfast," to be insured by the defendants, for the term of one year, by a policy dated December 15, 1845. Conditions are annexed to the policy, which by its terms constitute a part of it. By the tenth condition, it is necessary after a loss by fire, that the assured should forthwith give notice thereof to the company, and as soon as possible deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and shall also procure a certificate under the hands of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers), that he has made due inquiry into the cause and origin of the fire, &c.; and the assured shall also, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations, and certificates are produced, and examination, if required, the loss will not be deemed payable. And if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. By the policy it is agreed and declared to be the true intent and meaning of the parties thereto, "that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance, be appropriated, applied, or used to or for the purpose of carrying on or exercising therein, any trade, business, or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods, or merchandise, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates," &c., "then and from

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thenceforth, so long as the same shall be so appropriated, applied, used, or occupied, these presents shall cease and be of no effect."

The second condition, annexed to the policy is, "if [after] any insurance is effected upon any building, or goods, in this office, either by the original policy or the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of no effect."

Among the articles denominated hazardous is cotton in bales.

This action is upon that policy, which the plaintiffs introduced, and evidence, that the store and the goods therein were consumed by fire on the 20th day of March, 1846; together with the affidavit of James C. Moore, one of the plaintiffs, and the certificate of Andrew T. Palmer, a justice of the peace, who, it was admitted, resided most contiguous to the fire; the affidavit and certificate were dated March 22, 1846. It is not denied on the part of the defendants, that those papers contained all that was contemplated by the policy that they should contain, or that they were not made and produced in proper season after the fire. They were a substantial performance of those acts, as preliminary steps necessary, before the commencement of the action, unless the defendants required an examination of the plaintiffs under oath. This requirement was made, and the plaintiffs produced a document without objection, exhibiting such examination, in writing, signed by said Moore, and verified by oath, taken April 4, 1846. It appeared from the testimony of the defendants' agent who took the examination, that Moore answered all the questions put to him, and upon being informed, that a further examination from some one from the office would be wanted, he made no objection, but, as the agent understood, gave his assent; and when called upon on April 14, 1846, submitted to a further examination before the defendants' attorney, but declined to make oath to the answers there given to the questions propounded. It is insisted that for this omission the action cannot be maintained.

By the tenth condition annexed to the policy under which such examination may be required by the insurers, this exam-

ination before their agent or attorney is not a necessary prerequisite to the commencement of the suit, unless the assured are called upon to submit to it. If the demand is made, it becomes essential to the right of recovery, and it must be done before the commencement of the suit. When once fully made, reduced to writing, signed by the party examined, and verified by oath, this condition in the policy becomes fulfilled. A further examination afterwards is not required by the spirit or the terms of the policy and the conditions annexed, and therefore is not a preliminary step material to the maintenance of the action. It does not appear from the case that the examination before the defendants' agent was not as full as the latter desired to make it. Every question proposed was answered; the whole was reduced to writing, signed and sworn to, by the person who was examined. It does not appear to have been in contemplation, either by Moore or the agent, that if a further examination should be required, it was to annul the effect of that already completed, so far as it was material to perfect the plaintiffs' right, to call for indemnity for the alleged loss. If Moore had consented, after the first examination, to submit to another, and to make oath thereto, when requested, it could not be a waiver of the plaintiffs' right under the policy to commence a suit upon it, if such right existed without such consent. It moreover appears from the case, that Moore did submit to a full examination afterwards, when required by the defendants' attorney, which was all which he assented to do, according to the evidence of the defendants; and the facts so obtained were competent evidence to be used in the trial by them, notwithstanding they were not verified by oath.

It is contended, that as cotton in bales had been kept in the store at some time within the period covered by the policy, the court should have given the instruction requested to the jury, "that if they find the plaintiffs kept or had in their stock cotton in bales at the time of the fire, this action is not maintainable." The refusal to give this instruction cannot be legal ground of complaint, unless there was evidence that cotton in bales was in the stock of goods at the time of the fire, and that keeping or having such in their stock was prohibited by the policy. If the keeping of such article was unauthorized, without an in-

crease of the risk, by any means whatsoever within the control of the assured, it was not designed by the parties, upon a proper construction of the contract, that it should be an absolute forfeiture of all right of the assured under the policy, but that such right should be suspended and of no effect so long as such article should be kept in the store. The case does not find that there was any evidence that such hazardous article was there at the time of the fire, and the question of fact to be submitted to the jury, as the basis of the legal principle contended for, was hypothetical. If there was plenary evidence that such an article was in the store, and was consumed therewith, the policy would not necessarily be forfeited, or its operations suspended thereby. The policy contains no stipulation, that the goods in the store embraced no article which was hazardous. A certain amount "on the stock in trade of the plaintiffs, consisting of dry goods kept in a store," was covered by the policy, which prohibited the appropriation, application, or use of the premises for carrying on or exercising any business which was hazardous or extra hazardous, and for the purpose of keeping or storing goods of that character. The term "premises," when considered in connection with the whole policy, must have intended the store in which the goods were kept, and not the goods themselves, which were the subject of the insurance. By any other construction certain language used in reference to the premises must be regarded as unmeaning or absurd. The restriction does not extend to the keeping of a single article denominated hazardous or extra hazardous, as a part of the dry goods stock in trade, provided the store was not appropriated, applied, or used for purposes not intended by the language of the policy. These purposes were of a general nature, and distinguished from that of keeping a stock of dry goods for sale. It is not pretended that the store was used for carrying on a business unauthorized by the policy; and if the plaintiffs kept or had in their stock a hazardous article, it is by no means the same thing as appropriating, applying, or using the store for keeping or storing therein goods and merchandise which was hazardous. In the language of the court, in the case of *N. Y. Equitable Insurance Co. v. Langdon*, 6 Wend. 628, which was an action upon a policy containing substantially the same conditions as the one now

under consideration: "It appears to me, that the word storing was used by the parties in this case in the sense contended for by the plaintiff, viz., a keeping for safe custody, to be delivered out in the same condition substantially as when received; and applies only when the storing or safe keeping is the sole or principal object of the deposit, and not when it is merely incidental, and the keeping is only for the purpose of consumption."

Langdon v. N. Y. Equitable Ins. Co. 1 Hall, 226.

If the jury had found that the keeping of cotton in bales in the store increased the risk, and that such an article was kept in the store by the plaintiffs at any time during the period covered by the policy, the contract of insurance was thereby rendered void under the second condition. But the case does not show that any question of this kind was presented to the jury, or that the judge was requested to instruct them upon such point.

Was the affidavit of Moore, and his examination before the defendants' agent, competent evidence for the consideration of the jury, on the question of the amount of the loss? The facts contained in documents of this kind were intended as evidence; and they were required to be in that form that they might be preserved, and so verified, that they could not be regarded as statements casually or inconsiderately made, and subject to be modified or explained by recollections which might be subsequently called up. They are material for the protection of the rights of the insurers. One of them was required to be made immediately after the fire, and the other as soon as the underwriters should demand it, and before they should be exposed to be affected, to so great extent, as they might be by delay, by facts having little or no foundation in truth, stated by the party interested to increase the amount of his claim. This evidence may be very important, to confine the demand of the assured to the proper limits; and it may also be that which the party attempted to be charged would prefer should be adduced by his adversary. When introduced, it would be evidence for the jury to consider, like other facts in proof. Facts, which are inadmissible for the party offering them, if objected to, may be competent, when put in by consent or without objection. The documents, which the de-

defendants insisted could not be considered, and their contents weighed by the jury, touching the amount of the loss, were introduced by the plaintiffs without objection. They were necessary to show that the claim set up was payable before the institution of the suit. The right of the defendants to require this preliminary proof was not waived by them. They may have supposed that it was for their benefit to require their introduction for some purpose; and when legitimately before the jury, no rule of law would prohibit them from giving these papers due consideration in connection with all the other evidence in the case.

It was contended at the trial, that the plaintiffs were guilty of fraudulent conduct and false swearing in the preliminary affidavit, and therefore they were not entitled to recover. Much evidence was introduced upon this point, which is reported; and a motion was filed that the verdict for the plaintiffs be set aside because it was against evidence. By the preliminary affidavit, the affiant estimated the value of the goods in the store at the time of the fire, at the sum of twenty-eight hundred dollars. The jury returned a verdict for the plaintiffs for the sum of eighteen hundred and fifty-three dollars in damages. The defendants rely particularly upon this verdict as proof of false swearing on the part of the affiant, showing, as it is contended, that the jury disregarded the facts asserted and sworn to in the affidavit. The jury were properly instructed, that if they found that there was false swearing on the part of the plaintiffs, they would not recover. It cannot be assumed that the instruction was disregarded without convincing evidence. The value of the goods in the store at the time of their destruction was only a matter of judgment by Moore who made the estimation, and the affidavit founded thereon. No account of the stock had been taken previous to the fire, and the books were consumed with the goods and the store. No basis existed by which the amount of the loss could be ascertained with any degree of accuracy. The judgment of Moore, in his estimation of the value of the property lost, was properly considered with all other evidence upon the same point. They might believe that his interest in the question would affect his judgment to some extent, though honestly

exercised. The general knowledge of the jury in relation to the kind of property consumed, and its value, might also have had upon their minds a legitimate influence. Other facts and circumstances on the same question, coming from other sources, would have their proper effect, and when the whole was weighed, it might have produced the conviction that Moore had erred in opinion, without being guilty of any dishonest intention.

The case of *Levy v. Baillie et als.* 7 Bing. 349, has an analogy in some respects to the case before us. The verdict being for a less sum than the estimation of the loss by the plaintiff, it was contended by the defendants therein, that it established the fact that there was fraud and false swearing. The verdict was set aside on the payment of costs. But inasmuch as the case shows, that it was also insisted that the verdict was against evidence, and the court do not even intimate the grounds of their decision, it cannot be inferred that they were governed by the principle here contended for as one of legal obligation.

The evidence bearing upon the questions raised by the defence, was peculiarly for the consideration of the jury. It was necessary that fraud and false swearing, of which the defendants contended the plaintiffs were guilty, should be affirmatively and satisfactorily established before that defence could prevail. The proof of this was not of such a character as to authorize the court to say, that the jury was under such improper influence that their verdict should be disturbed.

Exceptions and motion overruled.

Kent, for plaintiffs.

Hobbs, for defendants.

KENTUCKY & LOUISVILLE MUTUAL INSURANCE COMPANY vs.
SOUTHARD.¹

(Court of Appeals, Kentucky, July 15, 1848.)

Warranty. — Representation. — Pleading. — Title.

The general rule in insurance is that a warranty must appear on the face of the policy, and no instructions are regarded as warranties unless inserted in the policy.

¹ 8 B. Mon. 634.

 Warranty. — Representation. — Pleading. — Title.

The statements in the survey and application are not in general to be regarded as warranties; though if untrue they may amount to such misrepresentations as will avoid the policy, and if relied on in defence the plea should show the importance and untruth of the representations.

A plea averring a representation that there was a kitchen about fifteen feet from the dwelling, does not necessarily imply that it was used as such, and that no part of the dwelling was used as a kitchen, and without other averment showing clearly that the representation was fraudulent and misleading, and the hazard increased, the plea is not good.

A plea averring that the building was used for other purposes than those represented, which increased the hazard, should also show that it was used differently from the manner in which it was used at the date of the policy, and that the insurance would not have been made at the rate granted or at all, if the representation had been adhered to.

A plea to an action on a policy of insurance, relying upon a fraudulent representation, should aver that the misrepresentation or concealment was material to the acceptance of the risk or rate of insurance, and to point out in what the insecurity consisted, and how the risk was greater.

The insured should state truly his title to the premises insured; and a plea impeaching the policy in this respect should show such facts as will enable the court to say that the title has not been fairly disclosed, if they be true.

The verbal representations of the insured to the surveyor, at the time of making the survey, not proper to be detailed to the jury, in an action of covenant on the policy, under the issue in this case.

MARSHALL, C. J., delivered the opinion of the court.

THIS action of covenant was brought by Southard to recover for the destruction by fire of his dwelling-house, insured by the Kentucky and Louisville Mutual Insurance Company. The policy on which the action is founded insures the plaintiff to the amount of \$7,000, against loss by fire, from the 6th day of March, 1841, to the 6th day of March, 1847, upon his "one story brick mansion-house, situate, &c., adjoining the city of Louisville, lately occupied by James Southard, &c.; a mortgage on the building and the land on which it stands, in favor of James Burks, for \$3,500. The aforesaid building is occupied as a dwelling-house." And it is provided that "if the premises aforesaid shall at any time when a fire may happen be occupied in whole or in any part for purposes more hazardous than that which exists at the date hereof, unless liberty so to occupy, &c., be expressly given in writing on this policy, every clause, article, &c., to be wholly void. Reference being had to the application of the said Southard, and survey filed, for a more particular description, and as forming part of this policy." In the condition, or terms annexed to the policy, it is stated, that insurance is in no case made on more than two thirds of the value of any building, and that in case of total loss, the com-

pany is not liable to pay more than two thirds of the actual value of the building at the time of loss.

The declaration after setting out the policy at large avers that the said mansion-house was at the date of the policy, and at the time of its destruction by fire, of great value, viz., of the value of \$12,000; that the said house and the land on which it was situated were, at the date of the policy, and always thereafter, the property of the plaintiff, subject to the mortgage to Burks, and to two mortgages subsequently made; that at the date of the policy, and afterwards until it was destroyed by fire, the said house was, and continued to be occupied as a dwelling-house, and that it was not at the time of the fire occupied for any purpose more hazardous than existed at the date of the policy; that the plaintiff did, in good faith, make a fair and full representation to said company of all facts and circumstances within his knowledge touching or affecting the risk of said property, and did fully and fairly disclose to them the true state of the title of said property and the incumbrances thereon, according to his best information and knowledge; and did in all respects comply with the duties incumbent on him by law. The plaintiff then avers, that on the morning of the 1st of March, 1847, the said mansion-house was burnt and wholly destroyed by fire, which fire was by misfortune, and was not caused by any design nor act of the plaintiff, nor occasioned by any public enemy, &c., but was occasioned by some accident or casualty in a manner unknown to him, and that he lost thereby a large sum, viz., \$12,000; that notice was on the same day given to the company, with demand of payment, whereupon said company, by a resolution of the board of directors, determined to refuse payment, and had failed and refused, &c.

The defendants demurred to the declaration, and at the same time filed pleas 1, 2, 3, and 4, to which the plaintiff demurred. And the declaration having been adjudged good, and the pleas bad, time was given to the defendants to plead *de novo*. At a subsequent term the defendants filed pleas 5, 6, and 7; to the first of which the plaintiff replied by way of traverse, on which issue was joined, and to the two others he filed demurrers, which were sustained. The defendants then offered plea number 8, said to be in lieu of their demurrer to the declaration, which had

been overruled. But the court would not allow it to be filed, and the defendants having excepted to the refusal, a trial was had upon the issue made upon the 5th plea, and a verdict and judgment were rendered for the plaintiff for \$6,804.43. The defendants' motion for a new trial was afterwards overruled, and they have brought the case to this court for revision, questioning by the assignment of errors the correctness of the several opinions of the court in overruling the demurrer to the declaration, and in sustaining the demurrers to pleas 1, 2, 3, 4, 6, 7, and in refusing to allow plea number 8 to be filed, as well as of the opinions given during the progress of the trial, and on the motion for a new trial.

We are inclined to the opinion, that the defendants must be understood to have waived their demurrer to the declaration, and to have withdrawn their four first pleas, by taking time to plead *de novo*, and by offering new pleadings under the privilege thus allowed. But as the questions on all of the demurrers were elaborately argued here, we shall notice them all.

The declaration seems to contain every averment, both affirmative and negative, which is necessary either under the policy or the charter of the company, to show that the defendants were bound to pay the loss which had occurred. And the objection that the suit was brought within thirty days allowed to the company by the charter having been expressly waived in the circuit court, we are satisfied that upon the face of the declaration the plaintiff shows a good cause of action. The matter of the 4th plea, so far as it is a valid defence, being contained in the fifth, on which the cause was tried, the defendants were not prejudiced by the decision on the demurrer to the 4th plea, even if it was erroneous.

2. Then as to the three first pleas, they stand upon the assumption that the application of Southard for insurance and the survey of the building being referred to in the policy, as forming a part of it, are to be taken as if they were actually inserted in it, and that every descriptive statement of the property contained in either of them is by the law of insurance a warranty, the breach or untruth of which in any particular, whether material to the risk or not, avoids the policy.

But in the first place it is questionable whether even in the law of marine insurance, the principle which converts into a

warranty every matter of fact or description relative to the property insured which the parties have insured in the policy, is to be applied to any such matter not insured in the policy nor written upon it, though it be referred to therein as a part of the policy. For the question might still arise, for what purpose is it made part of the policy, and why was it not inserted in it? In ordinary contracts such matter, though actually inserted in the written memorial, has not necessarily the force of a covenant or warranty. In marine insurance, it acquires the force of a warranty from the very fact of being inserted in the policy. And as the insurer may insert so much of the applicant's description or statement as he intends to have the force of a warranty, there is room for the inference that so much as is not inserted is intended to have the effect of a representation merely, and is referred to as such. The general rule is well settled that an express warranty must appear on the face of the policy, and that instructions for insurance, unless inserted in the policy itself, do not amount to a warranty. So a memorandum upon a paper attached to the policy by a wafer, or rolled up in it, when it was shown to the underwriter and executed by him, has been held not to be a warranty but a representation merely. These positions are fully sustained by the cases stated in the notes, pages 11 and 12 of Douglas's Reports. Chancellor Walworth, in *Snyder v. Farmer's Loan Company*, 16 Wend. 481, admitting that the parties might, by stipulation inserted in the policy, give the effect of a warranty to a statement of facts contained in a separate paper, maintains the opinion that (in the absence of such stipulation), the principle which converts everything in the policy into a warranty, is not to be extended to anything not contained in the policy or warranty on the same paper. And in *Delonguemare v. The Tradesmen's Insurance Company*, 2 Hall, 589, Chief Justice Jones and Judge Oakley, upon the authority of the case just referred to and others, express the same opinion. 1 Cond. Marsh. 349, 451; 3 Kent's Com. 235; 13 Mass. Rep. 96; 3 Dowl. 255.

But in the second place. Whatever might be the doctrine in case of marine policies, in making which the insurer is in general wholly dependent upon the statements of the insured, with regard to the property and the risk, it has been seriously doubted

(by Chancellor Walworth, *ubi supra*), and so far as we know, has not been established by judicial decisions, whether the principle of construing every matter of mere description contained in the body of the policy into a warranty, should be applied with the same strictness to *fire policies*, where the misdescription is most generally the mistake of the underwriters' own surveyor. And in the third place. These warranties being conditions precedent, which must be performed or be true, however immaterial, there is an obvious propriety that they should be contained in the policy, which is to be kept by the insured, not only that he may be enabled to make the proper averments when he comes to declare, but that he may be fully apprised of the effect intended to be given to his statements. Since if they are considered merely as representations, it is sufficient that they were made without fraud, and are substantially true in every point material to the risk.

Under these considerations we are of opinion that it is at least safe to conclude that the reference in this policy to the application and survey as a part thereof, being a part of the clause which vacates the policy if the premises should, at the time of any fire, be occupied for purposes more hazardous than at the date of the instrument, should be understood as merely identifying the description and condition of the property at that time, for the standard of comparison in case of fire; that no other force or effect was intended to be given the writings referred to, than as being a description of the nature or purposes of the occupation of the building at the time; and that as the clause points expressly to the sort of variance against which it intends to guard (*viz.*, a more hazardous occupation), and declares expressly the consequence of such variance, these declarations should be regarded as expressing the entire scope and object of the reference beyond which it cannot be carried without violating the apparent intention of the parties. The entire clause, including the reference to the application and the survey, was intended to secure the insurers from loss by a change in the occupancy of the premises which should increase the risk, and not to bind the other party to the truth of immaterial statements not affecting the risk, nor to preclude him from changes either in the plan or occupation of the premises, unless the hazard

should be thereby increased. And the written application and survey were referred to as fixing the standard of comparison, and not for the purpose of creating or evidencing any covenant or warranty on the part of the insured, as to the condition or occupation of the premises at the time the insurance was made. The only covenant or warranty on this subject is contained in that part of the policy which describes the building as a mansion-house, situated, &c., and states that it was then occupied as a dwelling-house. The facts alleged in these pleas, that one room was occupied as a kitchen, cannot be taken as a breach of this warranty.

Since then the statements made in the survey, or even in the plaintiff's application for insurance, are not warranties, these pleas do not, in alleging the untruth of those statements, show a breach of warranty, and are, therefore, insufficient on that ground to avoid the policy or bar the action. But although the pleas allege a warranty and a breach of it, they should perhaps be deemed substantially good if they show such a misrepresentation as should avoid the policy. Considered in this view, the application and survey may be regarded as representations, and the alleged breach of warranty as an averment of the untruth of the representation. But in order to make the pleas good in this aspect, they should show, not only the untruth of the representation, but its materiality. And this, in our opinion, they fail to show.

The survey referred to in these pleas states that the house has eight rooms, all furnished in the most costly manner, and in first-rate repair, except the roof. The fire-places are all secure; there is a kitchen and negro buildings in the rear, though not connected by about fifteen feet, and there is a cistern in the vacancy with a pump, &c. The breach alleged in the two first pleas is, that one of the eight rooms was, at the date of the policy, and until the house was burnt, used as a kitchen, one of them stating that there was not a kitchen in the rear, the other that the house in the rear was not used as a kitchen. The third plea alleged that the house insured was not used solely as a dwelling-house, but one room was used as a kitchen, and the kitchen was not in the rear or connected with the house; and avers that the using of the room in the house as a kitchen

greatly increased the risk, and that the burning complained of was caused by fire from the said room used as a kitchen. This being the strongest of these pleas, will alone be considered.

The question is, whether the plea sufficiently shows the materiality of the alleged variance between the representation and the real fact as averred. It may be admitted that a dwelling-house is in more danger of being consumed or injured by fire, if one of its rooms be used as a kitchen, than if no such use were made of any room in it, but the kitchen was in another building unconnected with it.

But it is not admitted that the representation of a house, as a dwelling-house, is falsified by averment and proof that one of its rooms was used as a kitchen. And we do not regard the statement in the survey, that there was a kitchen and negro building in the rear, as entirely equivalent to a representation that there was no kitchen in the dwelling-house. The terms dwelling-house and kitchen have not such a precise and definite import in common use, as that it must be necessarily implied from the statement as contained in the survey, that no room in the dwelling-house was used as a kitchen. And although it be admitted that this is the *prima facie* import of the language used, still, as it may have been otherwise intended and understood, and may have been accompanied by a statement or exhibition of other facts, showing clearly that it was not so intended and understood, we are of opinion that in a plea relying on a misrepresentation in this particular, it should have been shown explicitly that the insurers were, in fact, misled by the representation as made.

But further than this, we are of opinion that a plea attempting to avoid a policy on the ground of misrepresentation should show clearly that the fact misrepresented was material in view of the policy, and that it is not sufficient merely to show that the actual hazard of loss was greater as the fact existed, than it may have been supposed to be as the fact was represented. Taking the definition of materiality as laid down in 1 Marshall on Insurance, 467: "Every fact and circumstance which can possibly influence the mind of any prudent and intelligent insurer, in determining whether he will underwrite the policy at all, or at what premium he will underwrite it, is material." It is in

this view that the expression, "material to the risk," is understood to be used in the law of insurance. When, as is probably the case in marine insurance, every insurance is based upon the particular circumstances of each individual case, the misrepresentation of any fact which might enhance the actual hazard or risk of the subject might be deemed material and fatal, as it might influence the determination of the underwriter as to the rate of premium, if not as to his underwriting the policy at all.

But in regard to insurance on buildings against fire, it cannot be assumed that every circumstance of difference, which might, upon strict scrutiny, be regarded as causing an actual difference in hazard of loss, is to be deemed material. It is the known usage of companies, professing to insure buildings against fire, to classify them according to certain well defined circumstances of discrimination, founded generally upon the nature of the materials of which the building is constructed, its situation with respect to other buildings, &c., and the purpose for which it is occupied, or the nature of the articles to be kept in it. And the rates of insurance are fixed upon a general estimate of the hazard belonging to each class. And although it does not appear in this record that the defendants have adopted this usage as a general rule for the estimation of risks, still, considering the immense number of the subjects (houses) proposed to be insured, their susceptibility of classification in the manner referred to, and the infinite variety of minute circumstances of variation between them, impossible to be all considered or even all represented in every case, it is but reasonable to suppose that this company proceeds in the usual and rational way; and even if it does not, it may be assumed that neither the determination to insure nor the rate of insurance is affected by every circumstance or difference of whatever character, which may, upon consideration or investigation after a loss, be supposed to have affected the actual hazard. The safety of the insured requires some more certain standard than this; and we are of opinion that the plea, relying upon a misrepresentation, must show, not only that the fact misrepresented increased the danger or hazard of loss, but that, according to the rules or modes of business of the insurers, it would have enhanced the premium, or prevented the insurance, and thus that the insurers

were misled by the representation. This plea is defective in not showing either that the alleged representation affected the question or rate of insurance, or that it was fraudulently made with that intent. And although the state of the fact different from the representation may, as averred, have actually increased the risk, the law does not imply the further fact which is necessary to avoid the policy, and which should, therefore, have been stated. It is true that in an action of assumpsit, which is the common form of action upon policies in England, and in some of these states, the jury would, under the general issue, decide upon the materiality of any misrepresentation relied on by the defendant in evidence. But the court might tell them what in point of law constituted materiality. And as in such cases, it would devolve upon the defendant to prove the facts on which the question of materiality might depend, so in the action of covenant, it should devolve upon him to state such facts in his plea as would enable the court to determine the materiality or fraud of the misrepresentation relied on, or the plea should not be regarded as a valid bar. We cannot say, upon the face of the plea, that the policy is void because the survey or even the plaintiff represented that there was a kitchen and negro buildings in the rear, when in fact one room of the dwelling-house was used as a kitchen.

3. As already intimated, the 4th plea was substituted by the 5th, which presents more fully the averment that the house was burnt by the design, and with the connivance and fraud of the plaintiff, which matter was decided in favor of the plaintiff by the jury.

4. The 6th plea seems to be founded on the clause of the policy and of the charter, which declares that the policy shall be void if the building shall be occupied at the time of any fire for a more hazardous purpose than at the date of the policy, unless by the consent of the insurers, &c. The plea states that after the execution of the policy, the plaintiff, without consent, &c., caused one of the rooms in said dwelling-house to be altered and used the same as a kitchen. But it does not aver that the use or purpose for which the room was used was altered, nor that it was not used as a kitchen before the date of the policy. Although, therefore, the plea goes on to say that

the use of said room as a kitchen was a more hazardous occupation of the house than if it had been used wholly as a dwelling-house with a kitchen fifteen feet in the rear, unconnected, and that the house was burnt by the use of said room as a kitchen ; and although it were conceded that the use of one room as a kitchen after the date of the policy, when no room had been so used before, but the kitchen was in a separate building, &c., is such an occupation for a more hazardous purpose, as under the clause referred to would avoid the policy, still the plea is bad in this respect, because it does not show a change in the use or purpose of occupation of any room in the house, or an occupation after the policy different from what it had been before. And it is bad as a plea relying upon a misrepresentation, not only because it does not show that the room was used as a kitchen at the date of the policy, and contrary to the representation, but also, for the reasons already stated in reference to the 3d plea, because if it did show this, it does not show the materiality of the misrepresentation, as affecting either the rate of insurance or the question of insuring at all. It is, however, a sufficient ground of condemnation, that it is wholly uncertain, upon the face of the plea, whether the room was used as a kitchen at the date of the policy, or not until afterwards, and that it consequently fails to make out a case on either ground, for violating the policy.

5. The 8th plea, besides relying upon the alleged misrepresentation as to the locality of the kitchen, and the use of the house, as in former pleas, and the representation that all the fire-places were secure, alléges the new fact, that the fire-place of the room used as a kitchen was not secure ; that the use of said room as a kitchen, and the insecurity of the fire-place, was fraudulently concealed ; and that the use of said room as a kitchen was continued, and the fire-place insecure, and that the fire from the fire-place and chimney of said room consumed the house. The plea refers to the survey as containing the representations relied on. It makes no averment with regard to an increased hazard or risk, arising from the fact alleged to have been misrepresented or concealed. Nor does it allege that the burning of the house was caused by that fact. But waiving any remarks on these points, the plea, so far as it relies upon

the use of one of the rooms of the dwelling-house as a kitchen, is considered as being defective, on the ground already sufficiently discussed, that it does not show that the alleged misrepresentation and concealment were material to the acceptance of the risk or the rate of insurance. And, that so far as it relies on a misrepresentation or concealment of the true condition of the fire-place in said room, it is insufficient, because it does not show in what the insecurity consists, or point out the particular defect in the fire-place, nor even allege that there was any substantial defect or insecurity. It is not admitted that after a loss has occurred and at the end of six years' insurance the policy can be avoided by a vague conjectural statement of this kind.

A substantial defect in the fire-place, which might endanger the safety of the building, would no doubt be a material fact, the fraudulent misrepresentation or concealment of which might suffice to vacate the contract. But the plea does not show, nor even allege such a defect. It should have stated the particular defect, so as to apprise the plaintiff of the facts relied on to avoid the policy. The word *fraudulent*, applied to the representation or concealment, does not magnify nor even identify the fact misrepresented or concealed, and cannot supply the omission to show its materiality.

6. The 7th plea, the consideration of which has been postponed, because it introduces matter entirely new, was filed on the 27th day of September, 1847, and alleges that on the 24th day of September, 1827, one Gilbert C. Russell was seized in fee of the land and the dwelling-house insured, &c., and conveyed them to James Southard, who on the same day executed and delivered to him (a writing) showing that said conveyance was only a mortgage or security for money loaned by Southard to Russell, of which the plaintiff had notice at the time; the plaintiff claimed the said house and land by devise from James Southard, with full knowledge that his title was only a mortgage which Russell had a right to redeem, &c.; that the title was only a mortgage at the date of the policy, and that the true title of the plaintiff and the incumbrances were not disclosed at the time, nor expressed in the policy.

This plea is founded upon the 13th section of the charter of incorporation, which in effect declares the policy void, unless

the true state of the title of the assured, and the incumbrances thereon are expressed in the policy. This section came before the court, and received a construction in the case of this company against Addison & Clendennin, 7 B. Monroe, 470. And we are of opinion that if the plea, as it professes to do, shows that the true state of the title, at the time of the insurance, and as known to the plaintiff, was not disclosed and inserted in the policy, it presents a valid bar to the action, if upon the fact as it existed, the interest of the plaintiff in the premises was less valuable than from the statement in the policy it appears to be. But whether the omission to state the fact in the policy were the fault of the insurers or of the insured, we are of the opinion that the plea, which seeks on that account to avoid the contract, and in effect to force a forfeiture or penalty, should be explicit in the statement of all facts necessary to make out the charge, and that it should especially show that the omitted fact was such as really and materially affected the value of the plaintiff's interest in the premises. The time at which this matter was for the first time introduced, as well as its own nature and intended effects, requires that it should be scrutinized with some strictness.

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The material question is, whether the plea shows with sufficient distinctness and certainty that the title which had been conveyed to James Southard in 1827, was subject to redemption at the date of the policy, or in other words, that there was then a subsisting and available right of redemption which affected the value of the legal title in the hands of the plaintiff. The only averment upon this point is, that the title of the plaintiff at the date of the policy was a mortgage title, omitting the words previously used, that Russell had the right to redeem. And although about fourteen years had elapsed from the date of the deed to J. Southard to the date of the policy, and twenty years had fully elapsed from the former date to the filing of the plea, it is not alleged that Russell had even up to the last date claimed or asserted the right of redemption by act or even by word. Nor is it alleged that the writing which evidenced the nature and object of the deed was still in the hands of Russell as an enforceable instrument. But farther than this, the plea does not state the contents or substance of

the writing said to have been delivered to Russell. It does not state such facts as would enable the court to determine whether there was or not at the date of the policy an outstanding right of redemption, or whether the plaintiff's title was that of mortgagee, but merely stated the conclusion of the defendants that it was a mortgage title. The defendants might conceive that the instrument alleged to have been delivered to Russell converted his absolute deed into a mortgage, when, if exhibited, it would be entitled to no such effect. If they knew its contents, they should have stated them so that the court might judge. And if they did not know them, they should not be allowed to avoid their contract by the vague suggestion that the plaintiff had only a mortgage title at the date of the policy. We think this plea was properly adjudged insufficient.

7. Upon the trial of the issue on the 4th plea, two questions only were decided by the court against the defendants: 1st. The court on objections made by plaintiff refused to permit the surveyor of the defendants, by whom the survey already referred to was made, to answer the question as to what representations were made to him by the plaintiff on that occasion. Assuming the object of the question to have been to prove the plaintiff's representation as to the state of the building, or of its occupancy at the time, we are of opinion that the evidence had no relevancy to the issue, and was properly rejected. It was not suggested, and cannot be supposed, that any intimation was then given of a fraudulent design to burn the building after it should be insured. And even a fraudulent representation of its condition would furnish no reasonable ground for inferring such a design. The loss occurred about six years after the survey.

The court having, before the argument of the case, instructed the jury, on the motion of the defendants, that the measure of damages was two thirds of the actual value of the house at the time it was burned, with interest, &c., refused, after the argument was through, to give an instruction moved for by the same party, which, after stating the criterion of damages as above, went on to say, "and not the price that it would cost to reconstruct it (the house) according to the *exact* or fanciful carpenter's work that was on it, unless so far as that work did or would add to the value as a matter of taste or use." We do

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not perceive that the proposed addition was required by reason of any uncertainty or want of precision in the first instruction, or that it would have presented to the jury with greater distinctness or accuracy the true criterion of damages.

It would not have been necessary to inform the jury that the cost of the extra or fanciful wood-work which, in their opinion, added nothing to the value of the house either as a matter of taste or use, did not constitute a criterion, or even an element of its actual value. And it is not to be inferred from their verdict that they labored under any mistake on the subject, or that they found any part of the damages for work which was without value, either as matter of taste or for use. There was no error, therefore, in refusing this instruction, and none in overruling the motion for a new trial.

Wherefore, the judgment is affirmed.

Guthrie & Pirtle, for plaintiffs.

Loughborough, for defendant.

MILTENBERGER vs. BEACOM.¹

(Supreme Court, Pennsylvania, September Term, 1848.)

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A person may insure, in his own name, the property of another for the benefit of the owner, without his previous authority or sanction; and the insurance will enure to the party intended to be protected, upon his subsequent adoption of it, even after a loss has occurred. And if in such case the party effecting the insurance receives the fund, the party for whose benefit the insurance was made may recover the same.

The question considered whether the defendant in this case acted as agent for the plaintiff in effecting the insurance.

In this case, an action of assumpsit, it appeared that the defendant, being a lessor on ground rent, had entered for arrears, and had stated an account with the sub-lessees of the rents received, in which he charged them with the premium on an insurance effected by him upon the buildings which were the subject of the lease. He had effected the insurance in his own name, and, as was stated by the company's agent, as his own. The property having been burnt, and the defendant having received the insurance, this action was brought by the sub-lessees to recover the sum.

¹ 9 Barr, 198.

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Craft, for the plaintiff in error.

T. Hamilton & T. Williams, contra.

BELL, J. It is the observation of Marshall, in his Treatise on Insurance, that it would be extremely difficult to give any accurate definition of an insurable interest. The complicated rights which different persons may have in the same thing require that not only the owner of the absolute property, but those also who have a limited interest, may be at liberty to protect it by insurance. It is accordingly recognized as a rule in this department of the law, that almost any qualified property in the thing insured, or any reasonable expectation of profit or advantage to spring from it, may be the subject of this species of contract, provided it be founded in some legal or equitable title. Marshall on Insurance, 105. Thus a disseisor, especially after the right of entry is tolled, may represent the estate as his own, and effect an insurance of it, for he is the owner, though his title be defeasible *Curry v. The Com. Ins. Co.* 10 Pick. 541. So may a mortgagor, to the full value of the estate, after it has been taken out of his hands by the mortgagee, if the right to redeem still resides in the former. *Columbia Ins. Co. v. Lawrence*, 2 Pet. (S. C.) Rep. 25. And a consignee who has accepted bills on the credit of the goods consigned (*Wolff v. Horncastle*, 1 Bos. & Pul. 316), or made advances on the faith of the consignment, may insure them in his own name. *Parks et al. v. The General Int. Assur. Co.* 5 Pick. 34. In *Strong v. The Manufacturers' Ins. Co.* 10 Pick. 43, it is said that the value of the plaintiff's interest in the subject insured is not material. If he had an insurable interest at the time the policy was effected, and also at the time of the loss, he may recover the whole amount of damages done to the property, not exceeding the sum insured. Under this doctrine it is scarcely to be doubted that the plaintiff in error, having entered upon the demised premises by virtue of the covenants contained in the instrument called a perpetual lease, and looking to the tenements thereon erected as the chief, if not only source of payment of the rent in arrear, had such an interest in them as was insurable to the extent of their value. The destruction of these houses involved as well the means of payment of existing arrears as of further rents. It was, therefore, the interest of the plaintiff in error to

preserve them, or to secure the means of rebuilding in the event of disaster. In this respect his relation to the property was, in principle, similar to that of an insuring consignee to secure advances, or of the possessor of a qualified interest in the premises, subject to defeasance, as, for instance, a mortgagee or disseisor. I can, therefore, perceive no legal objection to a policy on the houses in question, purchased by him in his own name, and intended to cover only his interest in the annual rent. But were this otherwise, it seems to be settled that one who has, in fraud of the underwriters, received a sum insured by him to protect a pretended interest without existence, is not liable over to the owner of the property described in the policy. In *Grant v. Hill*, 4 Taunt. 380, Sir James Mansfield declares that such wrongful receipt, without any consideration, would not operate to convert the party into a trustee of the true owner, and consequently the latter could not recover in an action for money had and received, and in this the whole court concurred.

But on the other hand, it is very clear one may insure in his own name the property of another for the benefit of the owner, without his previous authority or sanction; and it will enure to the party intended to be protected, upon his subsequent adoption of it, even after a loss has occurred. This doctrine was asserted in *Durand v. Thouron*, 1 Porter's Ala. Rep. 238, and *Watkins v. Durand*, Ib. 251. In the first of these cases, the policy was of the goods in the defendant's store, without discrimination; but it appeared the plaintiff's goods, which had been deposited with the defendant for sale, were included in the list of goods insured; and the defendant, after the loss, promised to account with the plaintiff for their proportion of the subscription. On the trial, the defendant requested the court to instruct the jury, that if no instructions to insure were given by the plaintiff, when the goods were deposited or before the fire, the goods were not covered. This the court refused to do; and, on error brought, this refusal was sanctioned by the supreme court, saying the case was properly put on the ground that the defendant's promise to account contained an admission that he had insured for and on account of the plaintiffs. In the second case, the assurance effected by the defendant was of goods belonging to himself, or held in trust or on commission. In both,

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the plaintiffs were allowed to recover in an action for money had, although the amount of the insurance was less than the value of the defendant's proper goods destroyed. In *Hagedorn v. Oliverson*, 2 Maul. & Selw. 485, a ship bound to foreign ports was insured by one having no personal interest in her, in his own name and for every person to whom the same appertained. This was done without the previous authority of the owner, for whose benefit the insurance was in fact effected. He gave it no sanction before the loss of the ship, but afterwards adopted the policy; and it was held he was entitled to recover directly against the underwriters. This case is commented on by Hughes, in his *Treatise on Insurance*, p. 41. He says of it, that the insurance being for the benefit of the owner, the reasonable presumption was that he would adopt the act; and although he was under no legal obligation to repay the premium to the party negotiating the policy, there was such a moral obligation as furnished a sufficient consideration to support his adoption of it, after the happening of the loss.

These authorities abundantly prove that the contract of assurance, like other contracts, may be effected by the agency of a third party, without the authority of the party to be benefited, if he subsequently recognize it. It is true, that to enable the beneficiary to sue upon it directly, he must be expressly named, or the policy must be so framed as to cover, generally or specially, the interest of all concerned. But where the agent receives the fund, this, as the authorities show, is not necessary to the support of an action for money had and received. In such cases it is sufficient to prove the defendant constituted himself the representative of the interest insured, as agent of the owner, and that the latter ratified the act before or after the loss suffered. In the present instance the only question was, Did Miltenberger act as the agent of the owner of the property in procuring the insurance? This, of course, was a question of fact for the jury, and was so submitted by the court. Was there any evidence of it? In the account furnished to the plaintiffs below by the defendant, showing, as he averred, the condition of their pecuniary relations, there is a charge for four years' services in collecting rents, \$40, and another for premiums paid of insurance in 1845 and 1846, \$22.50. In his

books of account, produced on the trial, there is a similar entry, and it is conceded they relate to the subject of this contest. These certainly furnish some ground for the inference, that when the insurance was procured the defendant regarded himself as the representative of the owners, and acted for the protection of their interests as well as his own. Why charge them with the premium if they were to take nothing in any event under the risk? But it is said the plaintiffs repudiated the charge of the premium, and thereby; instead of adopting, disavowed the act of the defendant. Upon this point we have only the evidence of Mr. Hamilton, who simply says the account was not adopted by the plaintiff. It is asserted here this was because the defendant charged interest on the arrears of rent, and refused to allow it on the sums collected by him. The record does not show the reason of its rejection, and as it contained several items of date and credit, we cannot take it for granted, in the absence of proof, that it was disallowed because of the charge of the premium. It is said, too, this charge was excluded from the account stated by the referees, in the action of account rendered, with the assent of the plaintiff. But the testimony of the referee examined is, that it was agreed by the parties not to introduce the subject of the insurance there, inasmuch as another suit, the present, was pending to test their rival claims to the sum received from the underwriters. These adverse allegations were legitimate subjects for the jury, and were doubtless pressed upon their attention by the counsel of the respective parties.

The inference of agency is also supported, in a considerable degree, by the stipulations of the policy itself. By its terms it was left in the option of the insurance company, in case of loss, either to restore the buildings to their original condition, or pay the amount of the assessed damages. Had the company re-erected the houses, it cannot be thought they would have been the property of the defendant to the exclusion of the former owners, and it is difficult to imagine that he supposed an election to pay the damages suffered would work a change in the relative rights of the parties.

A jury might, therefore, well be content with slighter proof *aliunde* than would be satisfactory in other cases to establish

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the conclusion that the defendant, from the beginning, regarded the sum insured as representing the property in the tenements. But it is enough here that they have acted upon some proof in finding his receipt of it a trust.

The defendant, however, principally complains of that part of the charge in which the court asserted that having entered under the deed of perpetual lease to collect the arrears of rent, he became the agent of the plaintiff. Admitting the proposition to be incorrect, a candid examination of the whole charge will make it manifest the inaccuracy did the defendant no harm. The court expressly instructed the jury, that under the supposed agency he was not bound to insure for the benefit of the plaintiff, and refer them to the other proofs in the case, as furnishing the only evidence upon which the presence of an agency in the transaction of the policy can be established.

Judgment affirmed.

JAMES WHITE vs. DAVID BROWN *et al.*¹

(Supreme Court, Massachusetts, October Term, 1848.)

Insurance by Mortgagee.

If a mortgagee gets his interest insured, and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor.

BILL in equity for the redemption of certain mortgaged premises. It appeared that the mortgagee, having entered for condition broken, insured his interest, without making any agreement concerning the matter with the mortgagor. A loss having occurred and the insurance having been paid to the mortgagee, the mortgagor claimed that he was entitled to have the sum so paid deducted from the amount due the mortgagee for repairs.

The opinion of the court, so far as it related to the matter of insurance, was as follows:—

FLETCHER, J. The defendants next except that the master has deducted from the defendants' charges for repairs \$25, being the amount received by the defendants from insurers upon a

¹ 2 Cush. 412.

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policy effected by them, for a loss by fire. The master says, in his report, that he deducted this sum, it not being right that the defendants should be paid twice for the same thing. It certainly would not be right that the defendants should be paid twice by the plaintiff for the same thing; but it is certainly right that the defendants should be paid by rents and profits for repairs they made, and also right that they should retain of the insurance received what they were entitled to by virtue of any legal contract they had made. There was no privity in fact or law between the plaintiff and defendants, in the contract of insurance, and upon no principle can the plaintiff be entitled to the benefit of that contract. The defendants alone effected the insurance, and are exclusively entitled to the benefit of it, and the amount received by them under their policy could not properly be taken into the account, in adjusting the amount for repairs between them and the plaintiff. If a mortgagee gets his interest insured, and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor. The two claims are wholly distinct and independent. This exception must be sustained and the report amended accordingly.

GATES & DOWNER vs. THE MADISON COUNTY MUTUAL INSURANCE COMPANY.¹

(Court of Appeals, New York, December Term, 1848.)

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In an application for insurance, referred to in the policy as forming part thereof, the marginal inquiry in relation to the premises was in these words: "How bounded, and distance from other buildings if less than ten rods, and for what purpose occupied, and by whom?" The answer stated the *nearest* buildings on the several sides of the insured premises, but did not state all the buildings within ten rods. *Held*, that such answer was not a warranty that there were no other buildings within that distance than those mentioned.

It seems, that such an inquiry calls only for a statement of the nearest buildings within ten rods, and not for all the buildings within that distance. At all events, if the applicant understands and answers the inquiry in that sense, and the insurers accept the application and issue the policy, they cannot, after a loss, resist the payment thereof on the mere ground that the answer was not full.

¹ 2 Comst. 43.

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If the statement of the insured as to contiguous buildings amounts to a warranty and the warranty is falsified, it avoids the policy, whether the facts warranted against be material to the risk or not.

But where there is no warranty, and a suppression of facts is relied upon to defeat an action to recover for a loss, the information withheld must be material to the risk, and the question of its materiality should be left to the jury.

ASSUMPSIT upon a policy of insurance, tried at the Madison county circuit, before Gridley, circuit judge, in April, 1847. The case was this: The insurance was against loss or damage by fire on the plaintiffs' tavern house, barn, and shed, situated at Durhamville, Madison county, in the sum of \$1,000, for the term of five years from the 12th day of December, 1838. The policy referred to the application of the assured for a more particular description of the premises, and as forming a part of the policy.

The application was in the form used in the defendants' company, and was prepared by them. After stating the names of the applicants, the amount of insurance, and the subjects insured, it propounded in the margin the heads of inquiry on which information and answers were required of the applicants, and blank spaces were left opposite thereto in the body of the application to be filled up with such information and answers. One of the heads of inquiry was as follows, viz.: "How bounded, distance from other buildings if less than ten rods, and for what purpose occupied, and by whom?" Opposite to which, in the blank left for that purpose, the applicants stated as follows: "The nearest building east is the dwelling-house occupied by Charles Eggleston, which is about 48 feet; on the north, and about five rods distant is a shop, used in the season of navigation for manufacturing setting poles; and on the west end of the barn and shed is the dwelling-house occupied by Benjamin Frazee, which is about 14 feet distant. The tavern is at present occupied by Benjamin Sears."

It was stated in the policy of insurance that the same was made subject and in reference to the terms and conditions of the act of incorporation and by-laws of the company, which were to be used and resorted to, to explain the rights and obligations of the parties thereto in all cases not therein otherwise provided for; and section 15 of the by-laws declared that the company would make insurance for the term of five years, and

the amount of the premium note or sum to be deposited for the insurance of any building should be according to the hazard of such building, or the danger to which it might be exposed to loss or injury by fire, taking into consideration the materials of which it was composed, the manner of its construction, the purposes for which it was used, its situation as to other buildings, and all other circumstances affecting the risk.

On the 25th of August, 1840, the buildings were totally destroyed by fire, and this action was brought to recover for the loss.

The evidence showed that at the time of the application there were other buildings within the distance of ten rods from the insured premises, which were not mentioned in the application. One of them was a shop for the manufacture of wagons, in one part of which the business of blacksmithing was carried on. This was an extra hazardous building, but was situated seven or eight rods from the insured premises. There was no evidence to show that the insurers would have demanded a higher premium on account of the contiguity of this building, if they had been informed of its existence. The application truly stated the *nearest* buildings to the insured premises, but not all the buildings within ten rods.

The circuit judge, on the authority of *Burritt v. The Saratoga Mutual Insurance Company*, 5 Hill, 188,¹ and on the ground of the omission in the application to mention all the hazardous buildings within the distance of ten rods from the premises insured, nonsuited the plaintiffs; and his decision was affirmed by the supreme court sitting in the fifth district. See 3 Barbour's Sup. Court Rep. 73. The plaintiffs appealed to this court.

D. Brown, for the appellants.

N. Hill, Jr., for the respondents.

JONES, J., delivered the opinion of the court. If the statement of the insured in their application as to contiguous buildings was, in the legal acceptance of it, a warranty that there was no other building within the distance of ten rods from the premises insured, the fact of the actual existence of other buildings there at that time would falsify the warranty and be

¹ *Ante*, p. 276.

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fatal to the action, whether the risk was thereby increased or not. Was there such a warranty? Confessedly not, in express terms. The statement of the assured related in terms only to the nearest buildings, and did not import that those buildings were the only ones within the circuit of ten rods. This is the literal and common sense meaning of the terms used. Viewing the statement by itself, and not as an answer to any special inquiry put to the applicants, it could receive but one interpretation. It would plainly import that the buildings mentioned were the nearest on the several sides of the insured premises, and no other meaning could be assigned to it without the addition of language not used.

But this communication, it may be said, was an answer to an inquiry by the company, calling for information as to contiguous buildings, and intended to elicit full information of all the buildings within that distance, and that they had a right to consider and treat it as a full answer to that inquiry, and as intended to impress them with the belief and conclusion that the buildings thus specified were the only buildings within the said circuit or range of ten rods. But was that the inquiry, or were the applicants so to understand it? I think not. The call was not for all the buildings within ten rods of the applicants' premises, but for the distance of those premises from other buildings in any direction if less than ten rods. It was important to know what space there was between the buildings to be insured and those nearest thereto if any there were at a less distance therefrom than ten rods, that being the largest range of vacant space that was deemed of any importance. That it may be of use to know what buildings are within a given distance in its entire extent, and how they are occupied and used, may be admitted; but the danger of the communication of fire to the insured buildings from other buildings, arises chiefly from their contiguity or near approach thereto, and it increases with the diminution of distance. The distance, therefore, of the nearest buildings in different directions, is by far the most important subject of inquiry. Instances may occur of buildings or establishments of extreme hazard, such as powder-mills, or buildings for the deposit or storage of articles liable to explode or take fire, existing in the vicinity, which, though not the near-

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est, are yet so near as to involve the insured premises in their own hazards; and in such cases good faith and duty might impose on the applicant the necessity of disclosing the fact, to render the contract obligatory upon the insurers. It seldom happens, unless through the agency of such extreme hazards, that a fire extends beyond the next adjoining building; but the nearest building to the one on fire, when contiguous to it, or with but a very small vacant space intervening between them, is often involved in the same calamity. Hence it is that so much importance is always attached to vacant space and distance between the buildings insured and those standing nearest to them. And thus we see that in this case and in others, to some of which we are referred, the information called for is the distance of the tenements from other buildings; sometimes, but not in all cases, extending the inquiry to other matters also connected therewith.

When, therefore, these insurers inquired of the plaintiff in error what the distance was of the tenements offered for insurance from other buildings, if less than ten rods, would not, or might not, the plaintiff understand that the information sought of them was, how near the buildings in each direction approached to them? That these assured did understand the call in that sense, is obvious. Their answer shows it. And that answer is an apt response, and makes a full communication of the information asked for in that sense of the call. The statement was intelligible and clear. It stated the distance of their tenements from the buildings nearest thereto in every direction. It did not profess to state all the buildings within ten rods. The very term "nearest," used by them, implied that there were or might be other buildings more remote, but within the range of ten rods. The insurers were satisfied with the communication, and accepted it as sufficient. If the object and intention of their inquiry and call for information had been a full statement and communication to them of all the buildings within the ten rods' circuit, and the distance of the applicants' tenements from each of them, would they not have called for an explanation and further answer, as they must have seen the nearest buildings were only given, and that those were not stated to be the whole. The acceptance of the communication

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in that form, and acting upon it in issuing the policy, would certainly seem to show that they intended by their call to ask for the very information they obtained.

That the insurers so understood the matter is further manifest from the circumstance that they originally contested this claim on other grounds. It was not until after the decision of the case of *Burritt v. Saratoga County Mutual Fire Insurance Company*, 5 Hill, 188,¹ was known, that this ground of defence was taken, and it was on the authority of that case that the circuit judge nonsuited the plaintiffs, and that the supreme court gave their judgment. But that case does not in my view of it apply to or govern this. In that case the application contained a marginal note as follows: "Relative situation as to other buildings, distance from each, if less than ten rods." This inquiry was answered with the description of five buildings as standing within ten rods from the building insured. There were five other buildings, and among them a cabinet-maker's shop, standing within ten rods of the insured premises, and not mentioned in the application. The tenement insured was an ordinary risk and taken at fifteen per cent. The rate of a cabinet-maker's shop was from twenty-five to thirty per cent. A fire which commenced in the cabinet-maker's shop communicated to the plaintiff's tenement and damaged it to \$850, to recover which the suit was brought. The defence was, the concealment or omission to state the fact of the existence within the ten rods of the other buildings, and particularly the cabinet-maker's shop, which were standing within that distance from the premises insured, and the court sustained it. Mr. Justice Bronson, who delivered the opinion of the court, adverting to that point, observes, that the plaintiff was required to state the relative situation of his store to other buildings, and the distance from each if less than ten rods; to this he answered five buildings within the ten rods; and that although he did not in terms say there was no other building within ten rods, he must have intended that his answer should be understood by the company as affirming that fact; and as the answer was to be regarded as parcel of the contract, he found it difficult to resist the conclusion that the plaintiff had agreed that there were no

¹ *Ante*, p. 276.

other buildings within the ten rods than those mentioned in the application. He was strongly inclined to the opinion, he said, that there was a warranty, but that there was another feature in the case which rendered it unnecessary to settle that question. In cases of insurance against marine risks, the assured is bound, he observed, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. He would not apply that doctrine in its full extent to policies against fire; but when explicitly called upon for information, the applicant of such policy of insurance was equally bound to make a true and full representation concerning all the matters brought to their notice, and any concealment would have the like effect as in the case of a marine risk. In the case before him, he said the plaintiff was plainly and directly called upon to state the relative situation of the store as to all other buildings within the distance of ten rods, and he omitted to mention several buildings which stood within that distance, and among the number one far more hazardous than that to which the policy applied, and if there could be any doubt that the facts concealed were material to the risk, the question, he said, should have been left to the jury. But he proceeded to say that there was another view of the case which was still more decisive against the action; that the assured, in the case before him, was required by the conditions annexed to the policy, and by the form of application he used, to give the information he withheld, and that it was one of the conditions of insurance that if he should make any misrepresentations or concealment in the application the policy should be void and of no effect; that the parties had thus, by their contract, placed a misrepresentation or concealment in relation to particular facts upon the same footing as a warranty. They had agreed that the misrepresentation or concealment should avoid the policy, and the court had nothing to do with the inquiry whether the fact misrepresented or concealed was material to the risk or not.

These views of the case of *Burritt v. The Saratoga County Mutual Fire Insurance Company*, appear to me conclusive against the application of it to the case now before this court. The call of the insurers upon the assured in this case was clear, direct, and specific, requiring him to state "the relative situa-

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tion of his tenement as to other buildings, distance from *each* if less than ten rods;" and the answer enumerated five, but omitted all notice or mention of the rest. It is this feature of the case, and the express agreement of the answer in the condition annexed to the policy, that misrepresentation or concealment of any fact should avoid the contract, which distinguish it from the case now before the court, and those were the points on which the decision in this case obviously turned. In the present case the inquiry was widely different. It simply required a statement of the distance of the tenements from other buildings, if less than ten rods, not calling for the distance from all or from each of the buildings within the ten rods, but grouping them together and asking for the distance from other buildings collectively. It was a request to be informed of the vacant space between the applicants' tenements and other buildings, and with that request they fully complied. At any rate, if the inquiry was not so intended, it was so understood by the applicants, and they were not undeceived or apprised that a broader inquiry was intended.

This company cannot complain, as the company in the case referred to did, that they were misled by the applicants' answer. There, to the request to be informed of the relative situation of the store as to other buildings, and the distance from each if less than ten rods, the reply was a statement of five buildings as within that distance, which it was held must be understood as an affirmation that those five were all the buildings within that distance. Here, to a request to be informed of the distance merely of the tenements from other buildings, without any further explanation, the applicants respond by stating the nearest buildings in all directions where there was any building within the ten rods. How could the company be misled by that answer? It did not profess to give all the buildings within that distance. It virtually disclaims the averment that the buildings specified were the whole by stating them to be the nearest.

In the case of *Jennings v. The Chenango County Mutual Insurance Company*, 2 Denio, 75,¹ in a similar application for insurance, among other particulars, there was the following request or head of information called for, viz., "Relative situa-

¹ *Ante*, p. 437.

tion as to other buildings, distance from each if less than ten rods;" and the space for the answer was thus filled up: "The mill is bounded by space on all sides." There was a large barn standing within six rods of the mill. This was held to be a warranty that there was no building within ten rods of the mill, which the existence of a barn within that distance falsified; on the ground, I presume, that the answer that the mill was bounded by space on all sides, was to be understood and taken as an affirmation that there was no building in any direction within ten rods of the mill. And if a warranty that a fact does not exist, can be implied by the omission to state or mention it when interrogated as to its existence without any declaration or statement of its non-existence, then it may be that the answer thus given did imply such warranty. That such silence or omission to disclose or state a fact, if known to the party and material to the risk, might vitiate the contract, I can readily admit. Its effects as a warranty I do not so clearly see. But if it could have that operation in a case where, to such an inquiry, an answer is given in effect negating the existence of any building within the given distance, when there did in fact exist one within that distance, it would not follow that the same rule could be applied, or the same effect be given, to an answer which necessarily admits the existence of buildings within the ten rods, by specifying those standing nearest to the applicants' tenement, but does not profess or assume to give all the buildings that stand within that distance. Such an answer, if a warranty at all, is an express warranty that those buildings so specified as being nearest, are in fact the nearest buildings to the applicants' tenements, and no warranty can be implied from it that they were all the buildings within the distance of ten rods therefrom. The decision in that case was right, for there the answer to the call was a concealment and suppression by the applicant of the fact of the existence of the barn within that distance, which must have been known to him; and one of the conditions annexed to the policy in that case was that *any* misrepresentation or concealment in the application should render the policy void. It was equivalent in its effect in that respect to a warranty.

There is no such condition or agreement in the policy in this

Action — Assignee. — Preliminary Proofs. — Waiver.

case, or the condition annexed thereto, or in the by-laws of the company; and unless the answer to the request in the application is to be deemed a warranty that no other building than those mentioned did exist or stand within ten rods of the applicants' tenement, the ruling of the judge at the trial and the judgment of the supreme court were erroneous and must be reversed. In coming to this conclusion, I am not to be understood as intending to overrule or question the principle that the assured in a policy against fire are bound, when inquired of, to give full answer to the questions put to them, and to withhold no information material to the risk fairly called for, at the peril of forfeiting all rights under the policy, whether the same be withheld fraudulently or not; but the circuit judge went further, and held that on the principle of the case of *Burritt v. The Saratoga County Mutual Fire Insurance Company*, as he understood and applied it, the plaintiffs' right to recover was defeated upon the ground that the fact of the existence of buildings within ten rods of the insured tenements at the time of the insurance not mentioned or described in the plaintiffs' application, was of itself conclusive against his recovery; thus precluding all inquiry into the materiality of the omission to the risk; where, as I understand the rule, assuming the omission to state or describe those buildings in the application to be a concealment of which the company had a right to avail themselves in their defence, the question presented, in the absence of warranty, would be upon the materiality of the fact concealed to the risk, and that question was for the jury, and ought to have been submitted to them.

Judgment reversed and new trial granted.

JONATHAN BODLE *et al.* vs. THE CHENANGO COUNTY MUTUAL
INSURANCE COMPANY *et al.*¹

(Court of Appeals, New York, December Term, 1848.)

Action. — Assignee. — Preliminary Proofs. — Waiver.

Under the charter of the defendants, an action in the name of the assignee of one of their policies (alienee of the property insured) might be maintained.

¹ 2 Comst. 53.

Action. — Assignee. — Preliminary Proofs. — Waiver.

The assured having transferred an undivided interest in the property assured, and the defendants having consented that the insurance should remain good to the assured and his alienee, and the alienee being entered upon their books as a member of the company, and the policy not having been assigned: *Held*, a proper case for the interference of a court of equity on the part of the assured and alienee.

By the terms of the policy of insurance, the insured was required, within thirty days after a loss, to transmit to the secretary of the company a particular account of such loss. The insured furnished a statement of loss within the proper time, made out under the advice of the agent of the company, and subsequently produced his books, at the request of the company, for further explanation. The company made at the time no objection to the account, and offered to pay a sum amounting to about three fourths of the loss. Subsequently, on being pressed for payment, they objected generally to the account as insufficient. *Held*, that under the circumstances the objection was no defence to a suit in equity for relief on account of the loss of the goods insured.

APPEAL from the supreme court in equity. In May 1845, Jonathan Bodle and James B. Bodle filed their bill in the court of chancery against the Chenango County Mutual Insurance Company. After the commencement of the suit, the effects of the insurance company were, by an order of the court of chancery, placed in the hands of Austin Hyde as receiver; and Hyde was then, by stipulation and an order of the court, made a co-defendant in the cause. The case was this: On the 8th of June, 1839, the said insurance company issued a policy to the complainant, Jonathan Bodle, whereby they insured the sum of \$600 on his dwelling-house, \$600 on his store, and \$1,400 on his goods therein. In May, 1841, the complainant, James B. Bodle, entered into partnership with Jonathan Bodle, and from that time they jointly owned the goods in the store covered by the policy. Having applied to the company to have the insurance continued for the benefit of the firm, they received from the company a written consent as follows: —

“Chenango Co. Mutual Ins. Co. Office, May 26, 1841.

“The consent of the company is given that policy No. 2396, to Jonathan Bodle, shall remain good, to wit: \$600 on dwelling-house, and \$600 on store to Jonathan Bodle, and \$1,400 on goods to J. Bodle & Son, as requested in notice dated May 15, 1841.

A. Chandler, Sec’y.”

About the same time that the above consent was given, an entry was made by the secretary in the books of the company recognizing James B. Bodle as a member. On the 25th December, 1842, the store and goods therein were destroyed by

fire. The company having neglected to pay the loss, the complainant, Jonathan Bodle, brought an action at law in the supreme court upon the policy to recover for the loss upon the store. The declaration in that suit contained also a count setting forth the circumstances above mentioned, relating to the interest of James B. Bodle in the goods, the consent of the company above mentioned, alleging notice of the loss, &c., and concluding with a claim of damages large enough to cover the loss both on the store and on the goods. After that suit was at issue, the company were requested to waive any technical objection to a recovery for the loss on the goods, and to consent that the claim in respect to such loss might be litigated on the merits in the same suit. This the company declined to do. That suit was tried in August, 1844, and the plaintiff had a verdict for the amount of loss on the store only, on which judgment was perfected. The circuit judge, before whom the case was tried, upon the situation of the claim for loss on the goods being stated, ruled that such loss could not be recovered in that action, and therefore no evidence in regard to it was given to the jury.

The bill in this cause was subsequently filed for the purpose of compelling the company to execute to the complainants jointly a new policy upon the goods for the sum of \$1,400, to be dated on the 26th of May, 1841, that being the day when the company consented that the policy should remain good to the complainants jointly, as it respected the goods; or to compel the company to pay to the complainants the sum of \$1,400, the amount of their loss on the goods in question. One of the grounds of defence set up in the answer was, that the complainants had an adequate remedy at law. The answer also alleged that the complainants had not furnished a proper account of their loss, and insisted in general terms that the company had a legal defence to the claim. There were some other facts relating to the statement of loss furnished by the complainants, and to other grounds of defence argued in the court, which will sufficiently appear in the opinion of Gray, J.

Parker, vice-chancellor of the third circuit, to whom the case was referred for hearing, made a decree in favor of the complainants, declaring the company to be indebted to the com-

plainants in the sum of \$1,400 and interest, and directing the defendant Hyde, as receiver, to pay that sum out of the property and effects of the company. The supreme court in equity, on appeal, so modified the decree as to make the sum payable ratably out of the funds in the hands of the receiver, or which might come into his hands, and in all other respects affirmed the decree with costs. The defendants appealed to this court.

H. R. Mygatt, for the appellants.

S. B. Cushing, for the respondents.

GRAY, J. The seventh section of the company's charter, which, it is insisted, gives to the respondents a remedy at law, and which is urged as a ground for dismissing the bill in this case, provides that "the grantee or alienee having a policy assigned to him may have the same ratified and confirmed to him for his own proper use and benefit, upon application to the directors," and if ratified and confirmed, the assignee or alienee "should be entitled to all the rights and privileges and be subject to all the liabilities to which the original party, to whom the policy issued, was entitled and subject under this act."

This section, which is incorporated in many if not all our mutual insurance company charters, it has been held, in the cases of *Mann v. The Herkimer Co. Mut. Ins. Co.* 4 Hill, 187, and *Ferriss v. North Amer. Fire Ins. Co.* 1 Id. 71, authorizes the prosecution of an action on the policy assigned in the name of the assignee, and is so far an alteration of the rule of the common law, which admitted the prosecution in such a case in the name of the assured only, and like every other enactment which varies the common law, must be construed strictly. By applying this rule, no action *at law* for the recovery of their loss can be sustained in the name of the respondents in this case against the appellants. It is entirely clear from the facts admitted by the pleadings, that in this case there was not an assignment of the policy at all. There was an assignment only by one of the respondents to the other of part of the property insured, and an agreement by the company that the policy which had been previously issued to one, and covering the property which by the assignment became the joint property of the two, might stand and enure to the benefit of both. This was the arrangement between the respondents and the company. There was

no assignment of the policy, or of any part of the policy, by Jonathan Bodle, to whom it was issued, to James B. Bodle, who subsequently became a joint owner with him in the property. The ratification of the sale of part of the property by Jonathan to James B. Bodle, and the agreement and assent of the company entered upon their books, that the policy should remain valid and stand as a security for both, did not certainly operate as an assignment of the policy or a transfer of such an interest therein from one to the other, as is contemplated by the seventh section of the company's charter, and as would authorize the prosecution of an action at law in the name of the assignee. I regard the transaction between the Bodles and the company, that is, the assent of the company to the transfer of the property, and their agreement that the policy issued to one should remain good as a security for both, as creating an obligation on the part of the company, which is peculiarly and exclusively the subject of equitable cognizance. Chancery is, therefore, the proper and indeed the only form of relief to the respondents, and the action was rightfully prosecuted in that court.

The objection to the respondents' recovery on the ground of the omission of the respondents to furnish to the company proper and sufficient evidence of their loss, is also not well taken. The pleadings show a willingness and an offer on the part of the company to pay to the respondents for their loss, on the evidence submitted, the sum of one thousand dollars, the amount proved being one thousand four hundred dollars. I am not aware, nor does it appear, that the company at this time made any specific objection either to the manner of the proof or the account, or the principles upon which the estimate of loss is based. It is true that the company, at the time when they were furnished with the account of loss, requested the respondents to appear with their books before the executive committee of the company, for the purpose of explaining the account, so that the company might understand it. Upon this request one of the respondents, with the books and papers of their firm, did accordingly attend before the committee and exhibited to them the books, and gave such explanations as he was capable of giving on the subject; and although the committee did not, in express terms, acknowledge themselves satisfied, yet they manifested no dissatisfaction, nor did they interpose any objection to

the account; and their offering to liquidate the claim by paying \$1,000, which is about three fourths of the amount, and coupling that offer with no condition or qualification, must, I think, be regarded as a virtual admission of the correctness of the entire account. It appears it was not until they were subsequently written to by the respondents' attorney, and threatened with a prosecution, that they began to make objection to the sufficiency of the account; and the objection then made was general, that the account was not such as was required by the policy, without pointing specifically to any particular objection. By the terms of the policy, the person sustaining loss by fire is required, within thirty days after such loss, to deliver to the company "a particular account of such loss." What is particularly required to be stated in that account, the policy does not prescribe; but the respondents, as is disclosed by the testimony in the case, for information in this respect, and to enable them to comply with the requirements of the policy, applied to one of the agents of the company, and made out and transmitted to the company their account of loss, according to the instruction and advice of the agent. This agent is a witness of the respondents, and his testimony shows not only his agency, advice, and direction in the premises, but that he was a member of the company, and as such had previously sustained a loss therein by fire, and that his loss was paid by the company upon an account made out by him in the same manner, and upon the same principles as the account of the respondents; and that the mode adopted in making out the loss of the respondents was the fairest and most accurate of ascertaining their loss, provided their books were correctly kept. The accuracy of their books, besides being affirmatively established by the testimony of their clerk, was not questioned by the company, to whom they had been submitted for their inspection. I am inclined to think, therefore, that the account of loss furnished to the company was at least a virtual compliance with the requirements of the policy. If not, it devolved upon the company to make objections at the time, and to show wherein it was insufficient. The objection that the account was not such a particular account as was required by the policy, if made at all, was too general and indefinite. It should have pointed out particularly wherein the account was incorrect, so as to have enabled the respondents,

if really it was defective, to correct it. I am clearly of the opinion that this ground of objection, like the first, is not well taken.

The objection arising out of the proceedings of the attorney-general against the company as an insolvent corporation, subsequent to the filing of the bill by the respondents, and whereby the insolvency of the company has been judicially declared, is, I think, not available as a defence, otherwise than to authorize the modification of the decree of the vice-chancellor, made by the supreme court, directing a *pro rata* collection out of the funds of the company.

Nor is the objection resting on the forfeiture of the policy for the non-payment by the respondents of the assessment on their premium note, available. The pleadings do not, in my opinion, lay a foundation for such a defence. The general allegation in the answer, that the company has a legal defence to the claim of the respondents, set up in their bill, will not, I apprehend, admit of this specific defence; but if it did, the particular matter here claimed would not be available, for the reason that the by-laws of the company, in order to impose upon the policy holders the legal liability to pay assessments, require the publication of thirty days' previous notice of the assessments in a newspaper of the county, and of which publication of notice there is no evidence in the case. This defence is, therefore, clearly inadmissible for this reason.

The decree of the supreme court must, therefore, be affirmed.

Decree affirmed.

TRUMBULL COUNTY MUTUAL FIRE INSURANCE COMPANY *vs.*
JAMES T. HORNER.¹

(Supreme Court, Ohio, December Term, 1848.)

Deposit Note. — Assessment. — Defence.

A member of a mutual fire insurance company, when sued upon an assessment upon his deposit note, to pay a loss occasioned by fire, cannot set up as a defence that he and his associate corporators have neglected to comply with the provisions of their charter.

¹ 17 Ohio, 407.

ERROR to the court of common pleas of Trumbull county.

The action below was assumpsit. It was brought to recover an assessment upon the deposit note of the defendant, a member of said company, executed by him to the company upon the issuing of a policy to him by the company; the assessment being needed to pay a loss sustained by fire.

The defendant demurred to the plaintiff's declaration. The demurrer was sustained, and judgment rendered for the defendant. That judgment is sought to be reversed by these proceedings.

Two points were intended to be raised by the demurrer. 1. That there was no averment in the declaration that \$100,000 had been subscribed before the company issued the policy of the defendant, in accordance with the provisions of the charter. 2. That there was not a sufficient averment of demand before suit brought.

The case was reserved for the purpose of publishing the opinion of the court upon the first point.

Van R. Humphrey, McLain & Palm, and Crowell & Brown, for plaintiff in error.

Hoffman & Hutchins, M. & C. G. Sutliff, R. P. Ranney, and Geo. M. Tuttle, for defendant.

READ, J. We recognize to the fullest extent the cases cited to show that corporations are to be limited strictly to the power conferred.

The objection in this instance is urged by one of the corporators and one of the insured, and we doubt not had he sustained loss by fire, he would as strenuously have insisted upon his policy as he now opposes the payment of the amount assessed upon his deposit note to pay loss occasioned by fire to his neighbor.

It does not come with a very good grace from a corporator, after he has aided to put a corporation into action, and partaken of its benefits, to deny its existence in order to escape its responsibilities. This would look very much like a man attempting to take advantage of his own wrong to avoid doing what was right, a defence not much favored in law. What the amount to be subscribed by the associates was to be composed of, whether premium notes, deposit notes, or the property to be

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insured, before policies could issue, is not matter of easy solution. It is almost, if not quite, impossible to determine it from the charter. But be this as it may, we consider a corporator when called upon to respond to the obligations of the corporation, to be estopped from denying its existence in order to escape responsibility. At all events, when a corporation is sued, it is not necessary to aver in the declaration that the corporators have complied in all respects with the provisions necessary to give them power to act, whatever the case might be in a suit against a mere stranger. Such matter in the case of a corporation, if good at all, must come by way of defence, and then it might be replied that he could not set up his own wrong. As to the averment of demand, this is sufficiently alleged to admit of proof.

The arguments in this case are of very great length and very great ability, as they usually are in cases of steamboats and corporations, and under some other heads of the law. Some fifty suits it is said are depending upon this case. But we believe we have said all that is material.

Judgment reversed and cause remanded.

CHARLES McINTIRE, plaintiff in error, *vs.* JOHN PRESTON, defendant in error.¹

(Supreme Court, Illinois, December Term, 1848.)

Power of Company to take and assign Notes for Premium. — Secretary's Authority.

If the charter of an insurance company is wholly silent as to the power of the corporation to give credit for premiums, and to take notes in payment, such a power necessarily results from its power to make insurance, and to enable it to carry on its business advantageously.

After the plaintiff has shown that such power exists in the company, it is incumbent on the opposite party to show that the power has been taken away.

If the company has power to take such a note, and to hold and convey real or personal property, it has the power to negotiate the note.

In such case an indorsee will be presumed to be a *bond fide* holder for value until the contrary is shown.

A note payable to an insurance company was indorsed thus: "Without recourse, Joel

¹ 5 Gilman, 48.

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Scott, Sec'y." It was objected that this was not an indorsement by the corporation. *Held*, that the secretary's authority could only be questioned by plea of the defendant, verified by affidavit. *Held*, further, that the indorsement was sufficient to pass the legal title to the note.

DEBT, in the Pike circuit court, brought by the plaintiff in error against the defendant in error, and heard before the Hon. Norman H. Purple, without the intervention of a jury, at the September term, 1848, when a judgment was rendered for the defendant for costs. The plaintiff entered a motion for a new trial, which was overruled.

M. Hay & R. S. Blackwell, for the plaintiff in error.

O. H. Browning & N. Bushnell, for the defendant in error.

The opinion of the court was delivered by

TRUMBULL, J. McIntire, as the assignee of the Ocean Insurance Company, sued Preston in an action of debt upon a note given to that company. The declaration is in the usual form. The defendant pleaded *nil debet*, payment, set-off, and accord and satisfaction, upon all of which pleas issues were joined.

By consent of parties the case was tried by the court, and upon the trial the plaintiff offered in evidence the act of the commonwealth of Massachusetts, incorporating the Ocean Insurance Company, a section of the constitution of Massachusetts declaring what laws should be in force in that commonwealth, the first section of the statute of 3 & 4 Anne, ch. 9, making promissory notes assignable, &c., the report of the decision made by the supreme judicial court of Massachusetts in the case of *Jones v. Fales*, for the purpose of showing that the said statute of Anne was held to be in force in Massachusetts, and the note and the indorsement thereon, which was all the testimony in the case. The court found for the defendant upon the plea of *nil debet*, and for the plaintiff upon the other issues. A motion for a new trial was made, overruled, and an exception taken to overruling the same.

The assignment of errors questions the correctness of the decision of the court refusing a new trial and entering judgment in favor of defendant.

In determining this case several important questions arise: —

1. Was it necessary for the plaintiff under the issues, in order to show his right to sue, to prove the existence of the corporation to which the note was made payable?

2. Had the Ocean Insurance Company power to take and assign the note in question ?

3. Was the indorsement, "Without recourse, Joel Scott, Secretary," upon the back of said note, sufficient to transfer the legal interest therein to the holder of said note, and did it authorize the filling up of said indorsement in the manner it was done ?

Some other questions of minor importance were raised during the argument, which will be disposed of as we progress.

Upon the first point, as to the necessity for proof on the part of the plaintiff to show that the Ocean Insurance Company was duly incorporated, the argument seems to have proceeded upon the assumption that said company was the plaintiff in the action. Such is not the case. The suit is brought by Charles McIntire, a natural person, whose capacity to sue cannot surely be questioned under the general issue. Had the suit been in the name of the payees of the note, the question of their capacity to sue might, according to some authorities, have been raised under the general issue, and without a special plea for that purpose. Upon this point there is a great contrariety of decisions, as was shown upon the argument ; but, in our opinion, the better rule is, that in suits brought by corporations, the defendant by pleading the general issue admits the capacity of the plaintiff to sue, and that, if the defendant would deny the existence of the corporation, he must put in a plea for that purpose.

Such has been held to be the law by the supreme court of the United States, the courts of Massachusetts, Connecticut, Alabama, and several other states ; and, in our judgment, the decisions of those courts are the best sustained both by reason and authority. In the cases of *Phoenix Bank v. Curtis*, 14 Conn. 437, and of *Prince v. Commercial Bank of Columbus*, 1 Ala. 241, leading cases upon this subject are collected and reviewed. See also 4 Peters, 480 ; 4 Blackf. 202 ; 9 Ala. 513 ; 1 Mass. 159 ; 3 Pick. 245 ; 16 Conn. 421 ; 7 Mon. 584 ; 6 New Hamp. 197.

Secondly. Was it necessary for the plaintiff to introduce in evidence the charter of the Ocean Insurance Company, not for the purpose of showing its authority to bring suit, which would have been admitted by the pleadings even had the suit been in

the name of the corporation, but for the purpose of showing the power of the company to take and assign notes? Unless such a power can be inferred as necessary or incident to the purpose for which insurance companies are established, it was necessary to make such proof. The court is bound to know, judicially, something of the nature and object of insurance companies as well as the purposes for which they are created. Is the power to take and transfer a note incident to the exercise of their usual functions? It is said in 1 Phillips on Insurance, 205: "Generally, the premium on the whole sum named in the policy as insured is considered in practice to be due immediately, though in the United States it is not usually payable until after the expiration of a credit of from two or three to eighteen months according to the length of the voyage."

"In the case of insurance by an incorporated company, the premium note is generally made payable to the company by its corporate name, or to some of its officers;" accordingly the company, or its officers, "may negotiate the note immediately." Ib. 206. In the case of *The New York Fireman's Insurance Company v. Ely*, 2 Cowen, 678, the court says: "It may be conceded that the company have authority to take notes for the premiums due them, instead of demanding cash, because the power of giving credit may be necessary to enable them to make the most advantageous contract of insurance." If the Ocean Insurance Company had authority to take a note for any purpose, the note in question would be valid in the hands of the plaintiff, a *bonâ fide* assignee, although the company may have had no power to take this particular note. This was held to be the law in the case of *Willmarth v. Crawford*, 10 Wend. 341. If the charter of the Ocean Insurance Company was wholly silent as to the power of the corporation to give credit for premiums and take notes in payment, we should feel bound to decide upon the principles laid down in the foregoing authorities, that such a power necessarily resulted from its power to make insurance, and to enable it advantageously to conduct its business; and we think it would be going quite far to hold that the plaintiff was bound in the first instance to introduce the charter in evidence; for the purpose of showing that the company was not restricted by the act of incorporation

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from doing business in the manner usual and customary to insurance companies.

But the power of the Ocean Insurance Company to take the note in this case does not rest upon the presumption that insurance companies usually exercise such a power. The plaintiff introduced in evidence upon the trial the act of the commonwealth of Massachusetts incorporating said company, by the first section of which act the Ocean Insurance Company is created a corporation, authorized to sue, &c., and is invested "with all the powers and privileges granted to insurance companies, and subject to all the restrictions, duties, and obligations contained in a law of this commonwealth, entitled an act to define the power, duties, and restrictions of insurance companies, passed February 16, 1818, and in a law entitled an act authorizing the several insurance companies of the commonwealth to insure against fire, passed February 21, 1820, and is further authorized to purchase, hold, and convey any estate, real or personal, for the use of said company: *provided*, the said real estate shall not exceed the value of fifty thousand dollars, excepting such as may be taken for debt, or held for collateral security for money due to said company." The first section of the act of 1818 expressly authorizes insurance companies to make insurance on vessels, &c., and to fix the premiums and terms of payment; and the third section of said act authorizes insurance companies to loan a portion of their capital stock on mortgage or real estate, &c. The power to take and transfer notes in the legitimate business of the corporation is clearly recognized in the foregoing sections. The power to hold and convey any estate, real or personal, to make insurance and fix the premiums and terms of payment, and to make loans, necessarily implies the power to take notes; nor was the power to take notes, under the provisions of the foregoing sections, seriously questioned upon the argument, but then it was insisted, that this power may have been taken away by the provisions of the "act authorizing the several insurance companies of this commonwealth to insure against fire," passed in 1820, referred to in the charter of the Ocean Insurance Company, and which act the bill of exceptions shows was not offered in evidence.

The act incorporating the Ocean Insurance Company was passed in 1830, and because an act previously passed, authorizing insurance companies to insure against fire, and referred to in the charter, was not offered in evidence, we are asked to infer that there are provisions in the act restraining and taking away the powers granted in the charter and in the general law in reference to insurance companies, both of which are set out in full in the record, and read upon the trial of the cause. It is said that the court cannot determine whether the Ocean Insurance Company had power to take a note, because one of the acts referred to in the charter of that company is not before the court. The power to take a note may, as we have already shown, be fairly inferred from the first section of the charter, and if there were provisions in a former act, referred to in a previous part of said first section, inconsistent with this power, the last law would prevail; but we think it carrying the doctrine of presumption quite too far to assume that there are provisions in an act extending the powers of insurance companies so as to authorize them to insure against fire, inconsistent and repugnant to the whole scope and tenor of the laws granting powers to such companies.

After the plaintiff had shown the power to take a note on the part of the corporation by the production of their charter, we do not think it was necessary for him further to show that such power had not been taken away by some other statute, although such statute may be referred to in the charter. Having shown the power to exist, it was unnecessary for the plaintiff to show, negatively, that it had not been taken away, and especially would this be so, when the act referred to by its title professed, as in this case, not to *limit*, but to *extend* the power of the company. If there were restrictions in the act to authorize insurance companies to insure against fire, prohibiting such companies from taking notes in any case, it was incumbent on the defendant to have shown it, if he could, after having expressly recognized that power by executing the note in question. The plaintiff made out a *prima facie* case at least of power on the part of the corporation to take notes, and this was sufficient unless rebutted.

The corporation having the power to take a note, and to hold

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and convey any estate, real or personal, would necessarily have authority to negotiate such note in the ordinary transaction of the business of the company, and that such a power is usually exercised by insurance companies has already been shown. That the note in question was made and transferred in the ordinary course of business will be inferred, in case the corporation had power to make and transfer a note for any purpose, till the contrary be shown; and it would not even be admissible in this case, without first showing the plaintiff not to be a *bona fide* assignee, for the defendant to show the contrary. 3 Wend. 94; Angell & Ames on Corporations, 144; 6 Wend. 615.

The note being payable to the Ocean Insurance Company in its corporate capacity, *prima facie* no other evidence of user was necessary. 9 Ala. 516; 14 Johns. 238.

The power of the Ocean Insurance Company to assign this note has, however, been questioned, upon the ground that the statute of Illinois in reference to negotiable instruments, R. L. 482, while it authorizes notes to be made by any person or persons, body politic or corporate, only authorizes the assignment of such as are payable to any persons, and under the hand of such person or persons, which, it is insisted, means natural persons, and does not embrace corporations; and that they had no right at the time the note in question was indorsed to assign notes in this state. Two answers may be given to this objection:

1. By a fair construction of the statute we think corporations might assign notes in this state. The word "person" is sometimes so construed as to include corporations. *The People v. Ulica Insurance Co.* 15 Johns. 358.

2. The Ocean Insurance Company was located by its charter at Boston, Massachusetts, and the presumption is, that the note was indorsed at the place where the company did business. If so, by the first section of the statute of 3 & 4 of Anne, adopted in Massachusetts, the power to indorse notes is not restricted to natural persons. *Jones v. Fales*, 4 Mass. 245.

3. Was the indorsement in this case sufficient, and was the plaintiff authorized to fill it up, so as to show an assignment by the parties of the note?

The fifty-eighth section of the eighty-third chapter of the Revised Statutes declares: "In actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignment or signature of any assignor, unless the fact of assignment be put in issue by plea verified by affidavit of the defendant or some credible person, stating that he verily believes the facts stated in the plea are true." No such plea was interposed in this case; consequently the assignment, as alleged in the declaration to have been made by the Ocean Insurance Company, is admitted by the pleadings. Although this is admitted to be the law, yet it is insisted that the plaintiff is bound to introduce in evidence an assignment purporting to have been made by the payee of the note, that inasmuch as the indorsement "Without recourse, Joel Scott, Sec'y," did not purport to be an indorsement by the company, it was upon its face wholly insufficient to transfer the legal title in the note, and that said indorsement, unexplained by proof, was that of a guarantor, and not of an indorser. It is difficult to conceive why Scott should have prefixed the words "Without recourse" to his name, if the intention was to bind himself as guarantor. A guarantor *without recourse* would be a solecism. Such manifestly was not Scott's intention in placing his name upon the back of the note. That corporations may do business through, and are bound by, the acts of their officers, is well settled; and the Ocean Insurance company having power to assign the note in question, it unquestionably could make that assignment through its duly authorized secretary. Story, Agency, § 53; Angell & Ames on Corporations, 158; 8 Denio, 254.

That Scott was the duly authorized officer to make the assignment, would have been part of the evidence necessary to establish said assignment at the common law, and whatever evidence would have been admissible and required of the plaintiff, independent of the statute, is to be considered as given unless the assignment is put in issue by plea verified by affidavit. That the authority of the agent to act for his principal need not be proved in such a case, has already been settled in principle by this court, in the case of *Delahay v. Clement*, 2 Scam. 575.

This point of the case is, then, presented in the same light as

if the record contained proof that Joel Scott made the indorsement upon the note as the secretary, and under the direction of the Ocean Insurance Company. If he did, there can be little difficulty in determining that the indorsement was sufficient to carry the legal title to the note, and authorize the holder thereof to fill it up so as to show said assignment to have been made for and on behalf of said company. There can be no mistaking the intention of the parties in this case. The words "Without recourse" show that Scott intended to indorse the note, and not to guaranty the payment thereof; and the letters "Sec'y," annexed to his name, are sufficient to indicate that he did not suppose he was acting for himself alone.

Upon the point of the sufficiency of the indorsement, and the authority of the plaintiff to fill it up on the trial, we are not without authority. In the case of *The New Eng. Mut. Ins. Co. v. James De Wolf*, 8 Pick. 56, which was a suit against the defendant as the guarantor of a promissory note, the guaranty was as follows: "By authority from J. De Wolf, Junior, I hereby guaranty the payment of this note. Isaac Clap." The court held, "with respect to the form of the guaranty, we are of opinion that the effect of it must be determined by the intention with which it was made. If Clap had authority to make the guaranty of the defendant, and the words are such as not merely to bind himself alone, and it can be ascertained that he intended to act for De Wolf, the latter will be bound. The authorities cited to maintain the position that the name of the principal must be signed by the agent, are of deeds only, instruments under seal; and it is not desirable that the rigid doctrine of the common law should be extended to mercantile transactions of this nature." The court being satisfied from all the circumstances, that Clap professed to act for De Wolf, add, that the only question ought to be whether he had authority so to act, and the evidence showing that he had such authority, De Wolf was held liable.

In the case of *The Northampton Bank v. Pepoon*, 11 Mass. 288, the note was payable to the Berkshire Bank, and was indorsed by Simon Larned, calling himself "attorney." It was objected that admitting Larned to have been the attorney of the bank for the purpose of indorsing the note, yet, the manner

in which he had executed the power defeated his purpose, as he had not declared that he acted for and on behalf of the corporation. Parker, C. J., in delivering the opinion of the court, says: "If the authority of Larned was good to indorse as attorney, he having indorsed in blank, the plaintiff may erase the words written over his name and substitute other words which will give effect to the indorsement."

In the case of *Folger v. Chase*, 18 Pick. 63, it was held that a note indorsed "P. H. Folger, cashier," was sufficiently indorsed to pass the interest of the payees, the Phoenix Bank, in said note, and that if it was not sufficiently certain, the plaintiffs would have the right at the trial to prefix the name of the corporation.

In 6 Hill, 443, where a party placed the figures "1, 2, 8," upon the back of a bill of exchange, no name being written, it was held a valid indorsement, and that a person might become bound by any mark he thought proper to adopt, provided he intended to bind himself. See, also, 6 Wend. 443, and 7 J. J. Marshall, 84.

We are, therefore, of the opinion that the indorsement in this case was sufficient to pass the legal interest in the note, when properly filled up, which the plaintiff had the right to do upon the trial.

The finding of the circuit court was manifestly contrary to the evidence, and the motion for a new trial should have been allowed.

The judgment of the circuit court is reversed at the costs of the defendant in error, and the cause remanded for further proceedings not inconsistent with this opinion.

Judgment reversed.

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ACCEPTANCE.

Of Proposal to insure. See CONTRACT TO INSURE, or pp. 36, 202, 400.

ADJUSTMENT.

See PRO RATA ADJUSTMENT, or p. 419; TENANT FOR LIFE AND REVERSIONER, or p. 443.

AFFIDAVIT.

See EVIDENCE, or pp. 539, 758.

AGENT.

1. *Power of.*—An insurance company are bound by a policy issued by an agent appointed to effect insurances for a particular city and its vicinity, although he insures property at a distance of 100 miles in another city, for which and its vicinity, the company had another agent, if the agent issuing the policy claims to have authority to effect the insurance, and the fact of the existence of the other agency is not brought home to the knowledge of the assured. *Lightbody v. North American Ins. Co.* 1.
2. If facts transpired on the application for the insurance to put the applicant upon inquiry as to the authority of the agent, they should have been submitted to the jury, and cannot be urged on a bill of exceptions in support of a motion for a new trial. *Ibid.*
3. Evidence that the agent of the company in the place where the buildings insured were situated, would not have insured them had application been made to him, was held not to be admissible. *Ibid.*
4. *Delivery by.*—A delivery of a policy by an agent is good, and binding upon the principals where the premium had been previously paid, although the assured had been informed by the principals that they intended to revoke the appointment of the agent, if such delivery takes place before revocation or knowledge on the part of the agent of the intent to revoke. *Ibid.*
5. *Neglect of.*—An omission to mention, in such application, the buildings within ten rods, as required by the policy, although by the neglect of such agent, avoids the policy. *Susquehanna Ins. Co. v. Perrine*, 339.
6. *Who may insure.*—A person may insure, in his own name, the property of another for the benefit of the owner, without his previous authority or sanction; and the insurance will enure to the party intended to be protected, upon his subsequent adoption of it, even after a loss has occurred. And if in such case the party effecting the insurance receives the fund, the party for whose benefit the insurance was made may recover the same. *Milttenberger v. Beacom*, 779.
7. The question considered whether the defendant in this case acted as agent for the plaintiff in effecting the insurance. *Ibid.*

AGREEMENTS TO INSURE.

See CONTRACT TO INSURE, or pp. 36, 202, 400.

ALIENATION.

1. *Deed not delivered.* — It is not an alienation of property for the insured to make a deed thereof, and hand it to the grantee to be by him deposited with a third person, who was to hold it until a certain contingency, before final delivery to the grantee; although the grantee wrongfully puts the deed on record. *Gilbert v. North American Fire Ins. Co.* 9.
2. *Insurable Interest.* — A conveyance by the insured of the premises covered by the policy terminates his insurable interest, although it is agreed between himself and the grantee that he shall still receive the rents and profits of the estate. *Macarty v. Commercial Ins. Co.* 60.
3. *Seizure of Goods.* — A mere seizure of goods by a sheriff under an execution against the insured, and fastening the window shutters and doors, but without any removal of the goods from the building, does not constitute an alienation of the property. *Franklin Fire Ins. Co. v. Findlay*, 74.
4. *Repurchase.* — Although a policy provides that in case of any transfer or termination of the interest of the insured the policy shall be void, it is not avoided by a sale, if the insured retakes the same for non-payment of the price, and is in possession thereof at the time of the fire. *Power v. Ocean Ins. Co.* 81.
5. *Contract to convey.* — A mere contract to convey the property insured, at a future day, before which time it is burned, is not a loss of the insurable interest, or an alienation of the property. *Trumbull v. Portage Co. Mut. Ins. Co.* 289.
6. *Waiver.* — In an action upon a fire insurance policy conditioned to be void in case of the alienation of the property insured, it appeared that the company, having knowledge that an alienation had taken place, subsequently exacted payment of a deposit note given by the assured. *Held*, that this did not revive the policy. *Neely v. Onondaga Mut. Fire Ins. Co.* 344.
7. *Mortgage.* — By the express terms of the act incorporating the Indiana Mutual Fire Insurance Company, if any building insured "is alienated by sale or otherwise, the policy shall be void," and the lien on the property continues no longer. A mortgage is an alienation within the meaning of that clause. *McCulloch v. Indiana Mut. Fire Ins. Co.* 475.
8. A mortgage held not to be an alienation of the property, under the company's charter. *Conover v. Mut. Ins. Co.* 677.
9. *Deed of Trust. Fraud.* — The assured, being embarrassed, assigned their property, including the premises insured, to trustees to sell the same and pay the debts secured by the assignment; the deed of assignment containing only a qualified release of the assignors. In an action upon the policy of insurance, the assured contended, in reply to the defence that the policy was avoided by the assignment, that the deed was void. *Held*, that however this might be, it did not lie with the assignors to aver their fraud in making the deed of assignment, in order to avoid the title made by them under it, and thus fall back upon their former title. The deed of trust was an alienation and avoided the policy. *Dudmun Manuf. Co. v. Worcester Mut Ins. Co.* 488.
10. *Joint-tenants.* — Two persons, jointly owning certain property, caused an insurance of it to be effected in their joint names. Subsequently, and before loss, one of them conveyed his interest in the property to the other. After a loss had occurred an action was brought on the policy in the joint names of the two persons. *Held*, that they could not recover. *Howard v. Albany Ins. Co.* 501.

11. *Sale and Conveyance in Mortgage.*—Under the twelfth section of the statute incorporating the Vermont Mutual Fire Insurance Company, which provides that, when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void, a sale of the premises, with a mortgage taken back to secure the payment of the purchase-money, is to be treated as an alienation avoiding the policy, even though it be provided that the mortgagee shall retain the possession until the purchase money is paid. *Tittmore v. Vermont Mut. Fire Ins. Co.* 683.
12. But where the holder of the policy executed a warranty deed of the premises, and at the same time received back a deed of the same premises, with a condition annexed, that if the grantor in that deed should pay to the grantee the sum of \$2,000 within three years, and should allow the grantee in that deed to retain possession of the premises until that sum should be paid, then the second deed should be void, otherwise in force, and it appeared that the grantor in the second deed never, in any form, agreed to pay the sum mentioned, but it was wholly optional with him whether to do so or not, it was *held*, that this amounted merely to a conditional sale, and was not such an alienation as would avoid the policy. *Ibid.*
13. And it was also *held*, that the two deeds being executed at the same time, constituted parts of an entire contract, and were to receive the same construction as if the condition contained in the second deed had been inserted in the first deed. *Ibid.*

ARSON.

1. *Evidence of.*—To defeat a recovery on a policy of insurance on the ground that the plaintiff set fire to the premises, it is not necessary that the evidence should be sufficient to convict the plaintiff on a prosecution for arson. *Wightman v. Western Marine & Fire Ins. Co.* 330; *Hoffman v. Western Marine & Fire Ins. Co.* 481.
2. Where it appeared on the trial of a prisoner for arson in setting fire to his own dwelling, for the purpose of charging an insurance company with the loss, that the prisoner immediately after the fire consulted with and employed a lawyer to draw up the necessary papers for obtaining the insurance money, that he then stated his loss, that a notice was spoken of, and that the notice of loss served on the company the day after the fire, with the name of the prisoner subscribed, was in the lawyer's handwriting; *held*, that this evidence of the employment of the lawyer to give the notice of loss was sufficient to warrant the judge in admitting the notice, and submitting to the jury the question of the lawyer's authority to give such notice. *People v. Beigler*, 380.

ASSESSMENTS.

See ASSIGNMENT, or pp. 97, 98; ESTOPPEL, or p. 617; MUTUAL COMPANIES.

ASSIGNMENT.

1. *An executory contract* for the sale of the insured premises, not carried into effect at the time of the loss, though coupled with a parol agreement to assign the policy to the vendee, does not come within the clause forbidding assignments, and does not annul the policy, especially if by the contract of sale the vendor is to have a mortgage back from the vendee to secure the purchase money; although after the loss the contract of sale is carried into effect. *Fire & Marine Ins. Co. v. Morrison*, 28.
2. *Of Property but not of Policy.*—A fire insurance policy contained a provision, that "the interest of the assured in this policy is not assignable without the consent of the company in writing; and in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, this policy shall

- thenceforth be void." The assured assigned the policy, but not the property insured, without the consent of the company. *Held*, that the policy was avoided. *Smith v. Saratoga Mut. Fire Ins. Co.* 94.
3. *Quære* — Whether the condition could be waived by making assessments on the premium note? *Ibid.* 97, note. See 137, note. But as it did not appear that the assessments were made on account of losses which had happened since the assignment, *held*, that the policy was clearly avoided. *Ibid.* 98, note.
 4. If an insurance company pay a loss to a mortgagee of the insured, according to the terms of the policy, and such mortgagee pays over to the assignee in insolvency of the insured the surplus of the insurance money above his mortgage debt, such assignee is not liable in law for such money to one who has bought the interest of the insured in the property covered by the policy, subject to said mortgage; there having been no assignment of the policy to such plaintiff. *Wilson v. Hill*, 104.
 5. An insurance of buildings against loss by fire, although in popular language it may be called an insurance of the estate, is, in effect, a contract of indemnity with the owner, or other person having an interest therein, as mortgagee, tenant, or otherwise, to indemnify him against any loss which he may sustain in case the property is destroyed. If, therefore, the assured has wholly parted with his interest before the loss, the insured incurs no obligation to anybody; not to the assured, because he has sustained no damage; not to the purchaser, because in the absence of an assent to an assignment of the policy to him, there is no contract to indemnify him; because the policy is not incident to the estate, and does not run with the land. *Ibid.*
 6. But after a loss, the insured may assign his right to recover the insurance money, which will give the assignee an equitable interest and a right to recover the same in the name of the assignor, subject to any set-off and other equities against him. *Ibid.*
 7. *Fraud*. — Where a party took a policy of insurance from an insurance and trust company upon liquors, groceries, &c., and the same day on which the policy was executed permission was given by them to assign the policy to a third person, it was *held*, that the party to whom the assignment was made was entitled to recover to the amount of the interest which he had in the policy, notwithstanding the party to whom the policy was granted had deprived himself of his right to recover by acts of fraud. *Charleston Ins. & Trust Co. v. Neve*, 153.
 8. *Actions*. — The assignee of an insurance policy, though assigned with the consent of the insurers, cannot maintain a suit in his own name upon the policy; he can only sue in the name of the assignor. *Jessel v. Williamsburg Ins. Co.* 190; *Conover v. Mutual Ins. Co.* 677.
 9. *Nature of Policy*. — Policies of insurance against fire are personal contracts with the assured, and do not pass to an assignee or purchaser without the consent of the insurers. The transfer of the policy by consent is equivalent to a new contract of insurance with the transferee. *Lewitt v. Western Marine & Fire Ins. Co.* 295.
 10. *General Assignment*. — The policy of insurance contained the usual clause vacating the policy in case of assignment of it without insurers' consent. *Held*, that a general assignment by the insured of all personal property to pay creditors did not render the policy void; the clause having reference to the policy and not to the property insured. *People v. Beigler*, 380.
 11. *By-law*. — The provision of the by-laws requiring notice of assignment of the policy refers to assignment made before the loss. *Dadmun Manuf. Co. v. Worcester Mut. Ins. Co.* 488.
 12. *Rebuilding*. — A clause in a policy of fire insurance allowing the insurers to rebuild is not affected by an assignment, assented to by them, directing the company to pay the loss to another. *Tolman v. Manuf. Ins. Co.* 630.

- 13. A mortgage held** not an alienation within the statute for mutual insurance companies. *Conover v. Mut. Ins. Co. of Albany*, 677.
See PLEADING AND PRACTICE, or p. 56; **SECRETARY'S AUTHORITY**, or pp. 486, 677.

ATTACHMENT.

- A loss incurred** on a fire insurance policy, the amount of which is fixed by the award of persons mutually chosen by the insured and insurer, may be levied on by attachment in execution as a debt due to the insured. *Boyle v. Franklin Fire Ins. Co.* 291.

AUCTION.

See DAMAGES, or p. 396.

BLOWING UP BUILDINGS.

See DESTRUCTION OF PREMISES TO STOP FIRE, or p. 186.

BOARDING-HOUSE.

See DWELLING-HOUSE, or p. 138.

BOND FOR A DEED.

See ALIENATION, or p. 289; **FRAUD**, or p. 693.

BY-LAWS.

- A person insured** in a mutual insurance company becomes thereby a member thereof, and is bound by a by-law making the surveyor the agent of the insured and not of the company. *Susquehanna Ins. Co. v. Perrine*, 339.

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See NOTICE OF LOSS.

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See HAZARDOUS TRADES OR BUSINESS, or p. 24.

CHARTER.

- 1. It is no violation** of a charter, which contains a clause prohibiting the exercise of banking powers, to receive money on deposit. *State v. Urbana & Champaign Mut. Ins. Co.* 460.
- 2. An insurance company** does not forfeit its charter because of non-user by refusing to insure against extra hazardous risks. *Ibid.*
See POWERS, or p. 802.

COMMISSION.

See REPRESENTATION, or p. 202.

COMMISSION MERCHANTS.

See REPRESENTATION, or p. 202.

COMPLETED CONTRACT.

See CONTRACT TO INSURE.

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See FRAUD AND MISREPRESENTATION; WAIVER, or p. 13.

CONDITIONS.

A condition in a fire insurance policy, that if the insured refuse or neglect to pay any assessment made upon his premium note by the company, is valid; and its breach avoids the policy. *Beadle v. Chenango County Mut. Ins. Co.* 201.

CONSEQUENTIAL LOSS.

See PROFITS, or pp. 188, 514, 666.

CONSIGNMENT OF GOODS.

See REPRESENTATION, or p. 202.

CONTIGUOUS BUILDINGS.

See WARRANTY, or p. 785.

CONTIGUOUS MAGISTRATE.

See NOTICE OF LOSS, or p. 50.

CONTRACT TO INSURE.

1. Where insurers contract to deliver a policy covering specific property, and a policy be delivered (though not formally accepted) variant from the contract, and a loss occur within the insurance contracted for, a court of equity will grant relief according to the contract agreed on. *Franklin Fire Ins. Co. v. Hewitt*, 202.
2. Where a parol agreement was made with the president of an insurance company to insure the buildings of the assured, and the president made a brief memorandum of the terms of the agreement upon the application book of the company, but no policy was made out pursuant to such agreement, because the assured gave notice to the company that he wished to have the risk differently apportioned, and no premium was paid or secured, nor was the premium charged to the assured; and the assured was notified that he must come to the office and settle the business or the company would not consider itself liable in case of loss, but the assured did not call, nor did he pay or secure the premium: *Held*, that the parol agreement to insure was not a consummated contract, and that the company was not liable for a loss which subsequently occurred. *Sandford v. Trust Fire Ins. Co.* 400.
3. Whether a parol agreement to insure is valid by the law of the state — *Quere?* *Ibid.* See note, p. 405.

See DAMAGES, or p. 36.

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See INCREASE OF RISK, or p. 758.

CUSTOM AND USAGE.

See REINSURANCE, or p. 579; USAGE, or p. 214.

DAMAGED GOODS.

See DAMAGES, or p. 489.

DAMAGES.

1. *Agreement to insure.* — The defendant agreed to insure certain books consigned to him by the plaintiff, but failed to do so, and a large portion of them were destroyed by fire while in the defendant's possession. In an action for the breach of contract to insure, *held*, that the measure of damages, in the absence of proof of usage, was the value of the books. *Ela v. French*, 36.

2. *Mode of Ascertaining.* — In an action for the loss of a cotton-mill and machinery, the insured is entitled only to indemnity for his actual loss; one mode of determining which is to ascertain the cost of setting up new machinery in the mill, and deduct the difference between the value of the old machinery as it was when destroyed and the new as it is when erected; but there is no fixed rule as to the proportion to be deducted. *Vance v. Foster*, 68.
3. *Auction.* — Where defendants, sued on a policy of fire insurance underwritten by them, are shown to have consented that the property damaged by the fire should be sold at auction, the price at which it was sold is a proper criterion by which to estimate the damage of the insured. *Henderson v. Western Marine & Fire Ins. Co.* 396.
4. *Jury.* — In all cases where no rule of damages is established by law, the jury are to decide upon the question, and to their decision there can be no legal exception. *Brinley v. National Ins. Co.* 471.
5. *Damaged Goods.* — Where goods insured against fire are destroyed, the insurer is bound to pay their value at the time of the loss; if damaged only, he is bound for the damage between their value in their sound and damaged condition. Where the goods are so much damaged as not to be salable in the ordinary mode, a fair sale at auction made by the assured, after reasonable notice to the insurers, or with their knowledge, may be considered by a jury in estimating the damage, and in ascertaining the amount of the indemnity; but the price for which such damaged goods were sold at auction by the assured, without notice to, or knowledge by, the insurers of the sale, is not sufficient evidence of the value of the goods in their damaged condition. *Hoffman v. Western Marine & Fire Ins. Co.* 489.
6. *Actual Damage.* — The measure of damages, in an action on a fire insurance policy, is the actual damage done by the fire, not exceeding the amount of the insurance. *Ellmaker v. Franklin Fire Ins. Co.* 519.
7. *Partial Loss.* — In cases of fire insurance, the assured is entitled to recover the amount of the real loss sustained by him, if it be within the amount insured, without distinction between a partial and total loss. Therefore, where an insurance was effected for a sum above three fourths the real valuation of the property, in a company restricted to insurance within three fourths the value, and a total loss occurred exceeding in amount the sum insured, *held*, that the assured was entitled to recover a sum equal to three fourths the real value of the property. *Post v. Hampshire Fire Ins. Co.* 559.
8. *Mitigation of Damages.* — A contract of insurance against loss is one of indemnity. The right to recover is commensurate with the loss actually sustained. Any evidence conducing to show the loss less than that claimed would be admissible. The doctrine relative to mitigation of damages has no application to such a case *Franklin Fire Ins. Co. v. Hamill*, 567.
9. *Dutiable Goods.* — The insurer of imported dutiable goods, destroyed before the payment of the duties, is liable for the value of the goods as if the duties had been paid; and this too though the consignee or importer has executed no bond or security to the government. *Wolfe v. Howard Ins. Co.* 576.

See DESTRUCTION OF BUILDINGS TO STOP FIRE, or p. 186.

DELIVERY.

See ALIENATION, or p. 9; CONTRACT TO INSURE, or p. 202.

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See LEASEHOLD INTEREST, or p. 666 ; REPRESENTATION, or p. 427 ; WARRANTY.

DESTRUCTION OF BUILDING TO STOP FIRE.

Damages. — Where insured premises and goods were destroyed under orders by the municipal authorities to stop the course of a fire, and the owners obtained a judgment in damages against the corporation less in amount than the sum insured, *held*, that the insurers were liable for the residue. *Pentz v. Aetna Ins. Co.* 186.

DISTANCE OF BUILDING.

1. *Opinion.* — The answer to an inquiry as to the distance of other buildings stated, "East side of the block, small one story sheds, and could not endanger the building if they should burn." *Held*, that if this opinion was honestly entertained, it would not be a misrepresentation avoiding the policy, although the fire was in fact communicated through one of the sheds. *Dennison v. Thomaston Mut. Ins. Co.* 87.
2. *Warranty.* — In an application for insurance, referred to in the policy as forming part thereof, the marginal inquiry in relation to the premises was in these words: "How bounded, and distance from other buildings, if less than ten rods, and for what purpose occupied, and by whom?" The answer stated the nearest buildings on the several sides of the insured premises, but did not state all the buildings within ten rods. *Held*, that such answer was not a warranty that there were no other buildings within that distance than those mentioned. *Gates v. Madison County Mut. Ins. Co.* 785.
3. *It seems*, that such an inquiry calls only for a statement of the nearest buildings within ten rods, and not for all the buildings within that distance. At all events, if the applicant understands and answers the inquiry in that sense, and the insurers accept the application and issue the policy, they cannot, after a loss, resist the payment thereof on the mere ground that the answer was not full. *Ibid.*

See FRAUD AND MISREPRESENTATION, or pp. 276, 389.

DOUBLE INSURANCE.

1. The circumstances attending the insurance in this case *held* admissible to show that there was not a double insurance. *Stacey v. Franklin Fire Ins. Co.* 108.
2. *Finding of Jury.* — Where a party obtained from two different insurance companies a policy of insurance for the same stock of goods; and by one policy (to wit), the one obtained from the defendants, it was expressly stipulated, "that in case the buildings or goods herein mentioned have been already, or shall be hereafter, insured by any policy issued from this office, or by any agent for this office, or by any other insurance company, or by any private insurers, such other insurance must be made known to this office, and mentioned in or indorsed on this policy; otherwise this policy to be void." *Held*, first, that the question of whether the stock of goods described in this policy was the same as those described and covered by the policy in the Charleston Insurance Company, was a question properly for the jury, and their finding will not be disturbed. *Neve v. Columbia Ins. Co.* 147.
3. Secondly. It was *held*, that the policy of insurance obtained from the defendants was void, by the terms of the policy. It having been obtained by fraud and misrepresentation. *Ibid.*
4. *Notice.* — Plaintiffs, who were grocers, had two policies of insurance on their stock in trade. Having subsequently purchased the stock of another grocer, which had been insured by the defendants, they removed their own stock to the establishment

of their vendor, whose policy had been transferred to them with the consent of the defendants. Plaintiffs also obtained from their own insurers transfers of the policies on the stock in their former establishment to the same stock in the store to which they removed. The policies contained the usual clause requiring notice to the insurers, and an indorsement on the policy of any other insurance elsewhere on the same stock on pain of forfeiture. Plaintiffs omitted to notify defendants of the two insurances previously existing on their stock. The stock being injured by fire, in an action against defendants, *held*, that by consenting to the transfer of the policy to the plaintiffs, defendants became the insurers of the stock in trade of the former in the store to which they removed, which stock consisted of the goods originally covered by their policy, and of the plaintiffs' stock in their former store; that the latter were bound to give defendants notice of the two insurances previously existing on their stock, and that, having failed to do so, they could not recover. *Walton v. Louisiana Marine & Fire Ins. Co.* 196.

5. *What.* — Double insurance occurs only when the second insurance is upon the same property precisely as that covered by the first. Therefore, in the case of an insurance in the sum of \$1,000 on fixtures, and \$3,000 on stock, and another insurance of \$5,000 on fixtures and stock as one parcel, a double insurance has not been effected. *Howard Ins. Co. v. Scribner*, 281.
6. *Recovery.* — The amount of recovery on the first policy in such case, *held* not to be affected by the existence of the second policy. *Ibid*.

See PRIOR AND SUBSEQUENT INSURANCE, or p. 72.

EQUITABLE INTEREST.

See INSURABLE INTEREST, or pp. 153, 466.

EQUITY.

1. The court of chancery has jurisdiction to compel a specific performance of an agreement to execute a policy of insurance, or to compel payment in case of loss. *Carpenter v. Mut. Safety Ins. Co.* 505.
2. *Alienation.* — The assured having transferred an undivided interest in the property assured, and the defendants having consented that the insurance should remain good to the assured and his alienee, and the alienee being entered upon their books as a member of the company, and the policy not having been assigned: *Held*, a proper case for the interference of a court of equity on the part of the assured and alienee. *Bodle v. Chenango Co. Mut. Ins. Co.* 794.

See CONTRACT TO INSURE.

ESTOPPEL.

1. *Acceptance of Notice.* — Though the insured might be concluded by the acceptance of a policy variant from that contracted for, yet when it appears that such a policy was received by a clerk, and its terms were not known until after a loss, an acceptance will not be inferred, and the insured will not be concluded by the policy. *Franklin Fire Ins. Co. v. Hewitt*, 202.
2. An objection to the organization of the company *held* untenable. *Brouwer v. Hill*, 609; *Brouwer v. Appleby*, 593; *Trumbull County Ins. Co. v. Horner*, 800.
3. *Assessment.* — An insurance company, by making an assessment on a premium note with knowledge of a misrepresentation made by the assured in his application, will be estopped to allege the fact in an action on the policy. *Frost v. Saratoga Mut. Ins. Co.* 617.

EVIDENCE.

1. *The production* by a corporate body of its act of incorporation, and proof of use under it, afford presumptive evidence of a full compliance with all the prerequisites of the statute essential to give operation and effect to its several provisions and conditions. *People v. Beigler*, 380.
 2. *Declarations of Agent*.—In an action by a mutual insurance company on a premium note, *held*, that declarations of an agent of the company as to when the company would take risks, were not admissible in defence. *Held*, also, that similar declarations of the president of the company to the agent, at the time of his appointment, were not admissible. *Hackney v. Alleghany County Mut. Ins. Co.* 494.
 3. *Affidavit*.—The defendant gave in evidence an affidavit of the plaintiff to show that the latter had been guilty of false swearing. *Held*, that the affidavit did not thereby become evidence against the defendant of other matters. *Howard v. City Fire Ins. Co.* 539.
 4. *Parol evidence of an agreement by the president* of a mutual company to give up a premium note at the end of the time it had to run is inadmissible; and a promise made by the president when the note fell due to give it up, is also unavailing. *Brouwer v. Appleby*, 593.
 5. *The affidavit of the assured*, made in pursuance of the requirements of the policy, and his examination before the company's agent, after being introduced into court without objection, are proper evidence for the consideration of the jury as to the amount of the loss. *Moore v. Protection Ins. Co.* 758.
 6. *The verbal representations of the insured to the surveyor*, at the time of making the survey, not proper to be detailed to the jury in an action of covenant on the policy, under the issue in this case. *Kentucky Ins. Co. v. Southard*, 765.
- See USAGE, or p. 214.

EXAMINATION OF ASSURED.

Second Examination.—Where it was made a condition of a policy of insurance, that in case of loss, the assured shall, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of anything relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; if such examination be once made and completed, the assured cannot be required by the company to submit to a further examination under oath afterwards, although at the time of making the oath he may have assented to a further and future examination. *Moore v. Protection Ins. Co.* 758.

EXECUTION.

See ATTACHMENT, or p. 291.

FALSE REPRESENTATION.

See FRAUD.

FALSE SWEARING.

See EVIDENCE, or p. 540; FRAUD, or p. 56; PLEADING AND PRACTICE, or p. 698.

FORMAL DEFECTS.

A policy of insurance from said company is not avoided by any formal defects in the title deed of the assured, which might be corrected in a court of equity. *Swift v. Vermont Mut. Fire Ins. Co.* 466.

FORTHWITH.

See NOTICE OF LOSS, or pp. 405, 641.

FRAUD AND MISREPRESENTATION.

1. *False Swearing.* — A policy contained the condition that all fraud or false swearing should cause a forfeiture of the insurance. *Held*, That the condition had reference to fraud in the preliminary proofs only. *Ferriss v. North American Fire Ins. Co.* 56.
2. A reference will not be ordered in an action on a policy of insurance, where the defence is fraud on the part of the insured. In such case parties are entitled to a trial by jury. *Levy v. Brooklyn Fire Ins. Co.* 93.
3. *False Swearing.* — Under a policy of insurance, which provided that if there should be any false swearing on the part of the assured, he should forfeit all claim to the policy, a failure by the latter to sustain his affidavit, by direct evidence, to the amount claimed, will not be considered as proof of his having sworn falsely, and thereby forfeit the insurance. In open policies, it is often extremely difficult to prove the actual value of the goods lost; it suffices to show by testimony the great probability of the truth of the affidavit; and in weighing this testimony, the character of the assured, as well as the credibility of the witnesses, must be considered. *Marchesseau v. Merchants' Ins. Co.* 166.
4. *Distance of Buildings.* — The conditions annexed to a policy issued by a mutual insurance company, after providing that all applications for insurance should be in writing according to the printed forms prepared by the company, further provided that the application should state the relative situation of the building insured in respect to all other buildings standing within ten rods, and that any misrepresentation or concealment in the application should render the policy void. The printed form of application prepared by the company and used by the assured, contained a note in the margin thus: "Relative situation as to other buildings, distance from each, if less than ten rods;" and in the blank opposite to this, the assured inserted a description of five buildings which stood within the distance specified, but omitted to mention several others standing within the same distance. *Held*, that the omission, however innocent, was fatal to the policy; and this, whether material to the risk or not. *Burritt v. Saratoga County Ins. Co.* 276.
5. In an action on a policy of insurance covering — in \$750 each — a mill and machinery, it appeared that there was a provision requiring the assured to state the location of the property and its relative situation to other buildings, and its distance from them if less than ten rods; also all incumbrances, and the estate, if less than a fee, of the assured. *Held*, that an omission to state the distance of a building within ten rods avoided only the insurance upon the mill, and did not avoid that on the machinery. *Trench v. Chenango County Mut. Ins. Co.* 384. [This case is denied to be law in *Koontz v. Hannibal Savings Assoc.* 42 Mo. 126. See also *Wilson v. Herkimer County Ins. Co.* 6 N. Y. 53; *Smith v. Empire Ins. Co.* 25 Barb. 497; *Brown v. People's Ins. Co.* 11 Cush. 280.]
6. *Evidence.* — In an action on a policy of insurance, effected on account of the plaintiffs by an agent, testimony to prove that the latter, who had a policy for his own benefit on goods in the same building, designedly set fire to the building, is inadmissible, where it is neither alleged nor proved that they were in any way privy to the act. *Henderson v. Western Marine & Fire Ins. Co.* 396.
7. Nor will the record of a suit between the agent and the defendants, on his own policy, be admissible to prove fraud and false swearing on the part of the plaintiff in the latter suit, or to show what portion of the property insured belonged to the plaintiffs in the action in which it is offered in evidence. *Ibid.*

8. *False Swearing.* — Where in an action on a policy of insurance containing the usual condition, that if there be any fraud or false swearing, all claim under the policy shall be forfeited, there is a difference between the amount of loss sworn to by the insured in his account presented to the insurers and that proved on the trial, such difference is not conclusive evidence of fraud and false swearing; but the burden of proving that the difference was the result of error, and not of intention to defraud the insurers, is on the plaintiff, and, in the absence of any satisfactory explanation, it must be considered as imposing on the insured a forfeiture of all claim under the policy. *Hoffman v. Western Marine & Fire Ins. Co.* 481.
- Use of Lamps.* — If the applicant represent that lamps are not used in the building proposed to be insured, a cotton factory in this case, and the fact is that lamps were suspended and occasionally used there when needed, the policy would not take effect. *Clark v. Manufacturers' Ins. Co.* 520.
10. When representations are made or adopted, the denial in them of a material fact, such as here, that any lamp was used in the picking-room, where one or more were in truth used, makes the policy void, not only for misrepresentation, but misdescription and concealment. *Ibid.* 537.
11. *No Questions.* — But the relation of the parties seems entirely changed, if the insurer asks no information and the insured makes no representations. We think that the governing test must be this: It must be presumed that the insurer has, in person or by agent, in such a case, obtained all the information desired as to the premises insured, or ventures to take the risk without it, and that the insured, being asked nothing, has a right to presume that nothing on the risk is desired from him. *Ibid.* 538.
12. *Incumbrances.* — A failure to express in the policy the incumbrances on the premises avoids the policy by the express terms of the charter. *Addison v. Kentucky Ins. Co.* 554.
13. *Mortgage.* — A failure on the part of the assured to disclose the existence of a mortgage on the property, is not a circumstance material to the risk, and will not avoid the policy. *Delahay v. Memphis Ins. Co.* 665. See note p. 666.
14. *Bond for Deed.* — Where a mutual fire insurance company were entitled to lien on all property insured by them, and where one condition of the insurance was, that if the representations made by the applicant for insurance were materially false, the policy should not cover the loss; and where the insured, in his application, stated that he was the owner of the building insured, when he had only a bond for a deed of it upon the performance of certain conditions, which have never been performed; it was held, that the company was not liable to pay for a loss by fire, otherwise within the policy. *Brown v. Williams*, 693.
15. *False Swearing.* — The fact that the assured in his affidavit estimated the value of the goods consumed at \$2,800, and the jury returned a verdict for \$1,853 only, is not such evidence of fraud and false swearing as would justify the court in granting a new trial. *Moore v. Protection Ins. Co.* 758.

GAMBLING ESTABLISHMENT.

See OCCUPATION OF PREMISES, or p. 192.

GUNPOWDER.

See HAZARDOUS TRADES OR BUSINESS, or p. 38.

HAZARDOUS TRADES OR BUSINESS.

1. *Change of Occupation.* An insurance was effected on an undivided half of a paper-mill, and of the machinery therein. Afterwards the rag-cutter and duster were

displaced, and a pair of millstones for grinding grain were substituted, but the building and machinery in other respects remained unchanged. The fire arose from a cause other than the change in occupation. The policy contained a description of risks in classes denominated hazardous, extra hazardous, and those mentioned in a memorandum, which would be insured at special rates, and in this memorandum were mentioned grist-mills and paper-mills. It also contained a condition that the insurance should be void if the building insured should be put to a use denominated hazardous or extra hazardous :

Held, 1st, That the contract amounted to a warranty that the building should continue to be a paper-mill, but that by the introduction of the millstones the character of the building was not changed ; it was a paper-mill still.

2d, That, admitting the use of the millstones to have increased the risk, as the policy had expressly provided that putting the building to a use denominated hazardous or extra hazardous should avoid the insurance, and had not provided for any such consequences, when the building is put to a use described in said memorandum, it could not have been the intent of the contract that use of the building for the purposes mentioned in the memorandum should affect its validity ; and as the fire in this case arose from a cause within the risk as originally taken, assured was entitled to recover. *Wood v. Hartford Fire Ins. Co.* 24.

2. *Gunpowder*. — Where by the conditions subjoined and referred to, in a policy of insurance upon goods against fire, it is declared "that if there should at any time be more than twenty-five pounds weight of gunpowder on the premises insured, or where any goods are insured, such insurance should be void, and no benefit derived therefrom," the deposit of gunpowder over the weight, though for a temporary purpose, will vacate the policy. *Faulkner v. Central Fire Ins. Co.* 38.

3. To a plea alleging such a breach of the conditions of the policy, a replication averring that the powder had been put on the premises without the plaintiff's privity, because a vessel in which it was intended to ship it to Windsor had sailed without it ; and the plaintiff had used every exertion to find another conveyance without success ; in consequence of which it remained on the premises until a fire broke out which eventually consumed the plaintiff's premises ; but that long before it reached those premises the gunpowder was removed, and thrown into the harbor, and no loss or damage occasioned thereby to the goods insured, — was held bad on demurrer. *Ibid.*

4. *Use of Building*. — Where, in a policy upon a store and stock of dry goods, one of the conditions protected the insurers against the appropriating, applying, or using the store for keeping or storing goods of a hazardous character : *Held*, that the keeping of a hazardous article for sale among the other goods was not an infraction of that condition. Such a condition is merely a protection against appropriating the store for a depository of such goods, as a sole principal business. *Moore v. Protection Ins. Co.* 758.

See INCREASE OF RISK.

HUSBAND AND WIFE.

See INSURABLE INTEREST, or pp. 64, 98.

INCREASE OF RISK.

1. *Hazardous Trade*. — The plaintiffs effected a policy of insurance against fire, subject (*inter alia*) to the following condition : "In the insurance of goods, &c., the building or place in which the same are deposited is to be described, the quantity and description of such goods, also whether any hazardous trade is carried on, or any hazardous articles deposited therein ; and if any person shall insure his goods

or buildings, and shall cause the same to be described otherwise than they really are, to the prejudice of the company, or shall misrepresent or omit to communicate any circumstance which is material to be made known to the company, in order to enable them to judge of the risk they have undertaken, or are required to undertake, such insurance shall be of no force." *Held*, that this condition was to be referred to the time when the policy was effected, and that, in the absence of fraud, neither by the general law of insurance nor by such condition, was the policy avoided by the circumstance that subsequently to the effecting of the policy a more hazardous trade had, without notice to the company, been carried on upon the premises. *Pim v. Reid*, 245. But see note, p. 266.

2. *The general principle of the law of insurance* is, if the risk be materially increased by the act of the insured, and it cancels the loss, that avoids the policy. *Boatwright v. Aetna Ins. Co.* 507.
3. *Specification of Hazards.* — Where in a policy of insurance, a specification of hazards is followed by a provision that any increase of risk, within the control of the insured, shall vacate the policy; this provision is not restricted by the previous specification so as to make the insurer a special contractor under the specification. *Ibid.*
4. *Notice of any material change in the use of the property insured* should be given to the company. *Clark v. Manuf. Ins. Co.* 520.
5. *Cotton.* — Where, in a policy insuring a stock of dry goods, it is provided that the policy shall be void, if the risk shall be increased by any means whatever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring; and among the articles denominated hazardous is cotton in bales; — yet if cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy, unless the jury should find that keeping of such cotton increases the risk. *Moore v. Protection Ins. Co.* 758.

See HAZARDOUS TRADES OR BUSINESS.

INJUNCTION.

Against removing Goods. — Where by the terms of a policy of insurance the insurers are authorized, within twenty days after proof of loss, to elect to replace the articles lost or damaged by the fire, they are not entitled to file a bill for an injunction, to restrain the assured from removing or disposing of his goods until after the expiration of the twenty days; to enable them to take an inventory, &c., with a view to such election. But, upon such a policy, if the assured should, without any sufficient excuse, refuse to permit the insurers to make an examination of the goods saved from the fire, and a proper scrutiny as to the alleged loss, it would be proper evidence to submit to a jury, in a suit brought upon the policy; and it would authorize the jury to presume that the statement of the loss was false and fraudulent. *New York Fire Ins. Co. v. Delavan*, 20.

INSOLVENT COMPANIES.

1. *Premium Notes.* — In an action upon a premium note by a mutual insurance company, the charter of which provided that the company might receive in advance premium notes of persons intending to insure, and might negotiate such notes for the purpose of paying claims, or otherwise, *held*, no defence that the company had never effected any insurance, and was now in the hands of a receiver; and that the defendant must pay the amount of his note. *Ibid.*
2. *Fraud.* — Nor is it any defence, except upon the ground of fraud, that influential persons were held out to the defendant as having given similar notes, who had never done so. *Ibid.*

3. *Security Note*. — An action was brought by the receivers of an insolvent insurance company against the makers of a negotiable promissory note, given in pursuance of the twelfth section of the company's charter for the security of dealers. *Held*, that the defendants did not cease to be liable by the fact that the company became insolvent, or by the additional fact that the note was a renewal note, past due when the suit was instituted. *Hone v. Allen*, 597.
4. *Compensation*. — The agreement of the company being to allow five per cent. to the makers of such notes, by way of compensation, this must be allowed up to the time the notes pass into the hands of the receivers. *Ibid*.
5. *Renewal notes* given for the security of dealers stand upon the same footing as the notes given at the organization of the company, and are supported by the same consideration. *Hone v. Folger*, 601.
6. It is no defence to an action upon such a renewal note that the defendants made an application for insurance with the company after the failure, for the sake of reducing their note, and that the company refused to insure. *Ibid*.
7. If upon the maturity of a note given for the security of dealers, the maker gives a renewal note for the same amount, not deducting the amount of premiums earned during the time in which the first note was current, he will not be allowed to deduct the amount afterwards in a suit upon the second note by the company's receivers in insolvency. *Hone v. Ballin*, 602.
8. *Deduction*. — The maker of a note given as a security for dealers with the company, is entitled to have deducted therefrom the amount of premiums which the insolvent company has debited to him, upon paying the same. *Merchants' Mut. Ins. Co. v. Leeds*, 602.
9. *Note. For what given*. — When premium notes are taken subsequently to the organization of the company, it is a question of fact, to be determined by the character of the note and the evidence, whether it was given as a subscription note, to form part of the fund for the security of dealers, or was given for premiums in advance, in the usual course of business. *Merchants' Mut. Ins. Co. v. Rey*, 603.
10. *Reinsurance*. — A party insured in a company which reinsures his risk in another office does not, in case of the insolvency of the former, upon a loss, acquire a lien as against the latter upon the amount due on the contract of reinsurance. Such reinsurance fund goes to the creditors generally of the insolvent company. *Herckenrath v. American Ins. Co.* 604.
11. *Semble*, That the reinsurer in such case is bound to pay the full amount that the original insurer was liable to pay, and not merely the amount he did pay. *Ibid*.
12. *Note. Amount of Recovery*. — Where the charter of a mutual insurance company authorizes such company, "for the better security of its dealers, to receive premium notes in advance, of persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay to the makers of such notes a compensation, not exceeding five per cent. per annum, on so much of the notes as exceeded the premiums on policies actually taken; *held*, that a note taken by the company in pursuance of its charter for premiums in advance, was valid and effectual for the full face thereof, although the premiums on insurance actually received by the maker amounted to only a part of such note. *Deraismes v. Merchants' Mut. Ins. Co.* 606.
13. *Failure of Consideration*. — It seems, that a note so given is valid by force of the statute authorizing it to be taken, and therefore that a partial failure of consideration cannot be set up to defeat a recovery of the full amount. But if a consideration is necessary, the concurrence of others in giving similar notes for the purpose of giving a credit to the company in pursuance of an agreement entered into by all the makers, the contemplated advantages of insurance in such company, and the

- compensation authorized to be paid to the makers on such an amount as the notes should exceed the premiums on insurance actually taken, constitute a sufficient consideration to uphold such a note. *Ibid.*
14. *Evidence* that other persons besides the defendant, Hill, gave their notes to the insurance company in the same manner, as security for dealers, about the same time that Hill gave his: *Held*, admissible to show the purpose for which he gave his own note, in connection with evidence, both that one of the objects of the note was to constitute votes for an ensuing election of trustees of the company, and that he was a trustee at the time. *Brouwer v. Hill*, 609.
 15. *The published copy* of the annual statement was properly admitted in evidence to prove the fact of publication. And whether the defendant, Hill, was cognizant of the existence and contents of the statement, was a question for the jury on the facts proved. *Ibid.*
 16. *A security note* received by the company, payable to the maker's order, is an available security for its face value in the hands of a receiver of the company, though the note be not indorsed by the maker. *Ibid.*
 17. A surrender of such a note by the trustees, without consideration, is not binding. *Ibid.*
 18. The receiver may sue for torts committed before his appointment. *Ibid.*
 19. *The verdict of the jury*, that the note in question was given as a security for dealers, and not as a premium note, on an open policy on which nothing was ever underwritten, considered, and approved. *Ibid.*
 20. *An instruction to the jury* to the following effect *held* proper: That if the note was given to enable the defendant, Hill, to vote at the ensuing election of trustees, and with an intent and expectation on his part, that it would appear in the annual statement as one of the assets of the company, and would there stand among the securities given for the protection of dealers; and if it did so appear, with the defendant's approbation, or with his subsequent knowledge, without objection, he had no right to withdraw it. *Ibid.*
 21. *A premium note being taken in advance*, under the company's charter, for the better security of dealers, and the company being authorized to negotiate such notes for the purpose of paying claims in the course of its business, *held*, that the note in question was a valid security, and might be transferred to a party insured in the company on account of a claim for a loss. *Held*, further, that a transfer by the president of the company, without a previous resolution of the board of directors authorizing the act, was valid; he being authorized by the by-laws to make contracts and transact the ordinary business of the company. *Aspinwall v. Meyer*, 613.
See MUTUAL COMPANIES, or p. 424.

INSTRUCTIONS TO JURY.

In an action of covenant, where the plaintiff was not entitled to recover unless he proved that the property insured was destroyed by fire; that notice of the loss, and an estimate of damage sustained, were furnished the underwriter, according to the terms of the policy, it is error in the county court to instruct the jury, that the plaintiff is entitled to recover, in such a form as to take from them the consideration of the fact — when the fire occurred, and assume the day, or that notice of the disaster was forthwith communicated, and a particular account of loss furnished to the company. *Franklin Fire Ins. Co. v. Hamill*, 567.

INSURABLE INTEREST.

1. In Louisiana a husband has an insurable interest in his wife's personal property. *Clarke v. Firemen's Ins. Co.* 64.

2. *The husband* of one of several joint owners of real estate may have an insurable interest in his wife's portion, as tenant by the curtesy. *Franklin Marine & Fire Ins. Co. v. Drake*, 98.
3. In such case he may recover the whole amount insured to him, not exceeding the loss; and not merely the value of his own interest in the premises. *Ibid.*
4. *Equitable Interest*. — The plaintiff, placing the policy in the hands of a third party, to "assure" him, by consent of the underwriters, gave to the third party only an equitable interest, but such an interest as a court of law will recognize for the purpose of doing justice in a legal proceeding. *Charleston Ins. & Trust Co. v. Neve*, 153.
5. *Value of Interest*. — The contract of insurance is, essentially, one of indemnity; and this indemnity must be adjusted on the principle of replacing the insured, as near as may be, in the situation he was in at the commencement of the risk. The amount of insurable interest is the market value of the articles at the time and place of the commencement of the risk; and where they have been purchased near that time and place, the cost to the assured is most satisfactory, though not the only criterion of their value. *Marchesseau v. Merchants' Ins. Co.* 166.
6. *Incumbrance*. — According to the original plan of the Mutual Assurance Society, as developed by the acts of 1794 and 1795, none but an unincumbered fee simple estate was insurable; the insurance of mortgaged property was not thereby contemplated. In 1796, declarations were made for assurance in the Mutual Assurance Society. In 1798, the party who declared for assurance died. And in 1821, a bill was filed by the society against his widow and heir, to subject the property insured to sale for the payment of certain quotas, which had been required in 1805 and 1809, and succeeding years down to 1820, inclusive. It appearing that at the time of the insurance the property was under mortgage, and the lapse of time being also relied on, decreed that the bill be dismissed. *Ingrams v. Mut. Assur. Society*, 238.
7. *An equitable estate* in fee simple is as much an insurable interest in buildings, against fire, as an absolute legal estate in fee simple, whether at common law or within the act incorporating the Vermont Mutual Fire Insurance Company. *Swift v. Vermont Mut. Fire Ins. Co.* 466.
8. By the term less estate therein, in section ten of the act incorporating the Vermont Mutual Fire Insurance Company, is intended estates of *less duration* than estates in fee simple, as estates in fee tail, for life, for years, or at will. *Ibid.*
9. *Statement of*. — By the charter of the Kentucky and Louisville Mutual Insurance Company, they may insure estates held by fee simple title, or any less estate; but the nature and extent of the interest insured must be truly set forth. *Addison v. Kentucky Ins. Co.* 554.

See ALIENATION, or p. 60; NOTICE OF LOSS, or p. 9.

INTEREST.

1. *When allowed*. — Where there is no doubt as to the amount of the loss, interest is allowed from the time specified in the policy; but where the preliminary proofs are indefinite in this particular, interest is not allowed. *McLaughlin v. Washington County Mut. Ins. Co.* 17.
2. Where interest is properly allowed, the verdict will not for that cause be set aside, but the plaintiff will be allowed to remit. *Ibid.*
3. Interest is not necessarily recoverable on a policy of insurance, although the loss be not paid on the day prescribed by the policy, unless there is a positive stipulation to pay interest. *Oriental Bank v. Tremont Ins. Co.* 171.
4. In the absence of any contract to pay interest, if the amount payable by an insurance company is attached in their hands by a trustee process in favor of a creditor

of the assured, they do not become liable to pay interest during that time, if they practise no delay and are ready to pay upon being discharged from the trustee process, although they use the funds in their business. *Ibid.*

- 5 *Charter*. — Where an insurance company is by its charter authorized to lend money, without restriction as to the rate of interest, it does not work a forfeiture of its charter to receive more than six per centum; and when, by the terms of its charter, it is allowed to lend upon "such terms" as the directors may deem expedient, extra interest beyond six per centum can be collected by law. *Ohio v. Urbana & Champaign Mut. Ins. Co.* 460.

See INSURABLE INTEREST.

JOINT TENANT.

See INSURABLE INTEREST, or p. 98.

JURY.

See MATERIALITY.

LEASEHOLD INTEREST.

1. *Description*. — If the assured describes the property in his application as "his buildings," this is not a warranty, nor is it material, and proof that he is tenant for a year will satisfy the description. *Niblo v. North American Fire Ins. Co.* 666.
2. *Rents*. — Such tenant has an insurable interest in the property, but he can recover, in case of loss, only the value of the tenement for occupation for the unexpired part of the term. He cannot recover for the destruction or interruption of his business, nor for the loss of gains and profits, however certain, unless they are expressly insured. Profits must be insured as such. *Ibid.*
3. A leasehold tenement is not insurable by the Mutual Assurance Company, unless at least, the nature of the title be described. *Mutual Assur. Co. v. Mahon*, 672.
4. But if such insurance be invalid, the insured may, in the absence of fraud, recover back his premium paid. *Ibid.*

LIGHTNING.

Damage caused solely by lightning is not covered by an insurance of the property damaged against losses "by fire," or "by reason or by means of fire." *Kenniston v. Merrimack Co. Mut. Ins. Co.* 288.

LIMITATION CLAUSE.

1. *The seventh section of the act of the legislature* incorporating the Vermont Mutual Fire Insurance Company, by which a time is limited for commencing actions against the company for losses by fire, applies to a case, where the directors, after examining a claim for loss, wholly disallow the claim; and the operation of this section, in this respect, is not affected by the statute of November 18, 1839, which specifies the time for payment for such losses. *Dutton v. Vermont Mut. Fire Ins. Co.* 387.
2. Therefore, where a member of the company, residing in Windsor county, suffered a loss by fire, and duly notified the company thereof, and the directors, after making an examination of his claim, wholly disavowed the same, and notified him of their determination in January, and more than sixty days before the next term of the county court in either Washington or Windsor county, and he neglected to commence his action against the company for his loss at the next term of either of the said courts, it was held that his right of action was barred by the seventh section

of the act of incorporation, notwithstanding he was not, by the act of November 18, 1839, entitled to demand payment of said claim until a time subsequent to each of said terms. *Ibid.*

3. *Waiver.* — Where the directors of the Vermont Mutual Fire Insurance Company voted to disallow a claim for loss by fire, under a policy issued to two persons jointly, for the reason that one of the claimants had been indicted for setting fire to the building burned, and immediately gave notice of their determination to the claimants, which was more than sixty days previous to the then next stated term of the county court in Washington county, and also in the county where the claimants resided and where the property was situated: it was *held*, that the action for the loss was barred, under the act of incorporation of the company, by not being commenced to such next stated term; notwithstanding the directors subsequently, and after the claim was so barred, voted to pay to the claimant who was not so indicted one half of the amount of the whole loss. *Williams v. Vermont Mut. Fire Ins. Co.* 622.
4. A cause of action upon a policy of insurance, for a loss by fire, which has been barred by suffering the time limited in the charter of the insurance company for commencing actions to expire, is not capable of being revived by an acknowledgment, or a new promise. *Ibid.* See note, p. 629; *Ketchum v. Protection Ins. Co.* 698.
5. *Plea relying on.* — A policy of insurance provided that no action should be sustained against the insurer founded thereon, unless brought within twelve months after the cause of action should accrue; and that the lapse of time, in case of such suit, should be deemed conclusive evidence against the validity of the claim set up. *Held*, that a plea setting up such provision and the lapse of time specified, in bar of an action on the policy, was a conclusive answer to the suit. *Cray v. Hartford Fire Ins. Co.* 674.

LOCOMOTIVE.

1. Under the act of 1840, ch. 85, § 1, a person is entitled to recover from a railroad corporation damages caused by fire, though the fire be communicated from a fire in a building on the opposite side of a street sixty feet wide, which latter building took fire from a locomotive owned by the corporation. *Hart v. Western R. R. Corporation*, 560.
2. The fact that an insurance office has paid a loss occurring in this way, will not bar an action by the owner of the building against the railroad corporation also. *Ibid.*
3. The owner of the building in such case becomes trustee of the insurance office, and the latter, by indemnifying the former, may sue the railroad in the former's name. *Ibid.*

MATERIALITY.

1. *Jury.* — Where a fact, not provided for by a warranty on the face of the policy, is concealed, it cannot affect the right to recover, unless material to the risk, when it avoids the policy on the ground of fraud, or of its having misled the insurers; and in all such cases the materiality of the facts concealed or misrepresented must be left to the jury, who are the proper judges whether the risk has been thereby increased. *Lyon v. Commercial Ins. Co.* 192; *Gates v. Madison Co. Mut. Ins. Co.* 785.
2. The party assured is bound by the representations upon which the policy has been issued, in those cases only in which the facts represented are material, unless they are expressly warranted to be true, and so become necessary conditions in the contract. *Boardman v. N. H. Fire Ins. Co.* 548.
3. And this is the case whether the representations are contained in a writing referred to in the policy, and in terms made a part of it, or made otherwise than in such writing. *Ibid.*

4. Whether a misrepresentation be material to the risk or not, is a question for the jury. *Ibid.*

MISREPRESENTATION.

See FRAUD AND MISREPRESENTATION; WARRANTY.

MORTGAGE.

1. B., mortgagor of the premises, insured the same and assigned the policy to K., the mortgagee, as security for the mortgage debt. B. subsequently sold the property before the loss, and the purchaser now made an application — the company having in the mean time become insolvent — for a dividend which had been declared. But the application was dismissed with costs, though it was made in the name of K. *Kip v. Mut. Fire Ins. Co.* 199.
2. If a mortgagee gets his interest insured, and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor. *White v. Brown*, 784.

See ALIENATION.

MUTUAL ASSENT.

The plaintiff applied to the defendants' agent for a policy of an insurance on an academy then occupied by him. He paid the requisite proportion of the premium, executed a note for the residue, and had a survey made according to the regulations, at his own expense, all of which was laid before the company, and referred to its executive committee. The secretary of the company subsequently wrote to the agent, requiring the plaintiff to substitute an earthen-ware stove-pipe collar for his sheet-iron one, and to procure the assent of the trustees of the academy, who held the title, to the contract of insurance; saying that, being duly certified that these things were done, he would send on the policy. The plaintiff made the substitution and procured the written assent of the trustees, told the agent what had been done, and repeatedly urged him to call at the plaintiffs' house and attend to the matter. The agent said that he must first bring him the paper containing the written assent of the trustees. The agent being requested to call and get this, promised to do so, but never called for it. *Held*, that the policy had taken effect from the time of the notification of the performance of the requirements of the secretary. *Hamilton v. Lycoming Mut. Ins. Co.* 542.

MUTUAL COMPANIES.

1. *Organization.* — Members of a mutual company, when sued by the company on their premium notes, cannot object to the organization of the corporation. *Brouwer v. Appleby*, 593; *Brouwer v. Hill*, 609; *Trumbull Co. Mut. Ins. Co. v. Horner*, 800.
2. *Membership.* — Every owner of a present freehold estate in property which has been insured in the Mutual Assurance Society becomes a member thereof, according to the true spirit of the law and the scheme of the institution. *Shirley v. Mutual Assurance Society*, 299.
3. Where a husband insures property in the Mutual Assurance Society and dies seized, his widow takes her dower interest subject to the lien of the society; but she incurs no personal responsibility until dower is assigned her, whereby she becomes a member, and then only for such quotas and premium as accrue while she remains owner of the dower estate, with interest and damages thereon. *Ibid.*
4. Two tenements, which had been insured in the Mutual Assurance Society, descend, upon the owner's death, to his heirs, and are assigned to his widow for her dower. The widow and her second husband sell and convey her life estate. And the society has a claim for quotas accrued after the death of the first husband;

some before the assignment of dower; others afterwards and before the sale of the life estate; and the rest since that sale. It has also a claim for an additional premium accrued during the purchaser's ownership. *Held*, 1. The heirs of the first husband are personally responsible for what accrued after his death, and before the assignment of dower. 2. The widow and her second husband are personally liable for what accrued after the assignment of dower and before their sale. 3. The purchaser is personally responsible for what has accrued since, and for no more. 4. The party liable for any principal money is liable for interest and damages thereon. *Ibid*.

5. The Mutual Assurance Society has a lien upon property insured therein for the principal and interest due the society, but not for damages. This lien is effectual not only against the original member, but against all persons deriving ownership from him, and the property may be sold to satisfy the same. Though one party has the estate for life and another the reversion, the lien will be enforced against the tenement insured by selling the whole fee simple title thereof, and the whole of the tenement, unless from the nature of the property it be practicable and expedient to lay off a portion thereof for sale. Before directing such sale, however, the respective personal liabilities of the several parties chargeable will be ascertained. And if the tenant for life advance the amount chargeable to the reversioner, as well as what is chargeable to himself, there will be no sale of the reversion, but a lien established therein for reimbursement of the amount so advanced, with interest, to be enforced upon the falling in of the life estate. *Ibid*.

6. If a sale take place, what should be the terms as to cash and credit, and how the deferred instalments should be divided. *Ibid*.

7. Under what circumstances a lien upon two tenements insured may be satisfied by selling only one of them, and applying the proceeds in exoneration of the other. *Ibid*.

8. The deposit notes of a mutual insurance company are part of its capital, and the directors are bound to call in a sufficient amount on them to pay the insured, who are losers by fire. *Rhinehart v. Alleghany Co. Mut. Ins. Co.* 424.

9. Where a loss by fire takes the entire funds of the company, the losers have an immediate vested interest in the effects of the corporation. If the notes are insufficient to pay all the losers, then the whole amount of the notes and effects of the company, together with one per cent. on the amount of the property insured and destroyed, must be called in by the directors, and divided *pro rata* amongst them. *Ibid*.

10. Lien. — The lien provided for by the charter of the Indiana Mutual Fire Insurance Company expires with the death of the insured, so that it cannot be enforced against his heirs for losses occurring after his death; the heirs not having ratified or confirmed the policy. *Indiana Mut. Fire Ins. Co. v. Chamberlain*, 480.

Pro rata adjustment. See p. 419.

NEGLIGENCE.

1. Whether Insurance vitiated by. — Insurers are responsible for a loss occasioned by a risk insured against, notwithstanding such loss may be attributable to the negligence or misconduct — not amounting to barratry — of the assured or his agents. *St. Louis Ins. Co. v. Glasgow*, 317.

2. Where a steamboat was insured, among other risks, against fire, and afterwards was put on the floating dock, for the purpose of being repaired, and while in the dock was burned, and such burning was occasioned by the carelessness and negligence of the workmen having the boat in charge, the insurers were held liable for the loss. *Ibid*.

3. In an action on a policy of insurance against fire, evidence is inadmissible to prove that the loss occurred through the negligence of an agent of the plaintiff. The evidence is irrelevant. The underwriters are answerable for any loss occasioned by the negligence of those in charge of the property insured. But the negligence must be unaffected by any fraud or design on the part of the insured. *Henderson v. Western Marine & Fire Ins. Co.* 396. See *Chandler v. Worcester Ins. Co.* 3 Cush. 328 (1849).

NOTICE OF LOSS.

1. *Interest.* — In an action on a policy of insurance against fire, the plaintiff on the trial must show that he had an insurable interest in the premises; but it is not necessary in the account of loss furnished as a part of the preliminary proofs, to state the nature of his interest, if the conditions of insurance do not require it. *Gilbert v. North American Fire Ins. Co.* 9.
2. *Full.* — Under a policy requiring the insured to deliver a particular account of his loss, his affidavit that the mill which belonged to him, and which was insured, was, on a specified day, totally destroyed by fire, and that his loss and damage, by reason of the fire, would exceed \$10,000, was held a full and fair compliance. *Ibid.*
3. The condition of a policy of insurance requiring an account of loss is always liberally construed in favor of the assured. *McLaughlin v. Washington County Mut. Ins. Co.* 17; *Wightman v. Western Marine Fire Ins. Co.* 330.
4. *Contiguous Magistrate.* — The clause in a policy requiring a certificate of the loss from a "magistrate most contiguous to the place of the fire" does not require an exact literal compliance. *Turley v. North American Fire Ins. Co.* 50.
5. The certificate of one whose place of business was two or three blocks from the fire was held sufficient, although another magistrate lived within a block and a half from the place. *Ibid.*
6. The omission in such certificate to state that the magistrate was "acquainted with the character of the insured," may be cured by the refusal of the insurer's agent to return the certificate for correction or point out wherein it was defective. *Ibid.*
7. *Waiver.* — If there be a formal defect in the preliminary proofs, which could have been corrected had an objection been made by the underwriters to payment on that ground, the production of further preliminary proofs will be considered as waived if they do not call for a document, for instance, or make objection on the ground of its absence or imperfection, but put their objection upon other grounds. *McMasters v. Westchester County Mut. Ins. Co.* 54; *Edwards v. Baltimore Fire Ins. Co.* 405.
8. *Condition Precedent.* — An insurance and trust company have the right, on a trial upon a policy of insurance, to insist upon and demand the production of the preliminary proof as a condition precedent to the plaintiff's recovery. But they may, nevertheless, have waived their right to call for such evidence, by some act on their part, when the policy was presented for payment. *Charleston Ins. & Trust Co. v. Neve*, 153.
9. *When to be given.* — Notice of a loss of property insured against fire, should be given with as little delay as the circumstances of the case will permit, to enable the insurers to take measures to protect their interests, and preserve any property saved from damage or loss, but the preliminary proof, required for the purpose of adjusting the loss, need not be presented so promptly. *Wightman v. Western Marine & Fire Ins. Co.* 330.
10. Where notice of the loss was given immediately, a delay of nineteen days from the date of the fire is not unreasonable. *Ibid.*
11. *Pleading.* — Notice of the loss of property insured against fire, and the preliminary proof required, are in the nature of an amicable demand; and to put a party

- upon strict proof, the want of them should be specially pleaded. The fact of one of the conditions of a policy of insurance requiring that any claim for a loss shall be sustained, "if required by the books of accounts and other vouchers" of the assured, creates no implied warranty on the part of the latter to keep books of account, and to be ready to exhibit them when called upon. *Ibid.*
12. *Waiver*. — Where the answer of the underwriter stated that the proofs were wholly unsatisfactory as to the amount of the loss; that all responsibility was denied by reason of a material concealment as to the character of the risk; that all claim had been forfeited under a particular article of the policy, and he also reserved all objections to recover in any form, and without intending to waive any of the rights under the policy, this is not a waiver that the notice of the loss, by fire, was not "forthwith" given, and a particular account of the loss or damage, "as soon as possible after," delivered by the assured to the assurers, in conformity to the article in the policy, under which the claim was alleged to be forfeited. *Edwards v. Baltimore Fire Ins. Co.* 405.
 13. The loss took place in November, and the objection was made in March; notice given or an account of loss delivered, in March, would not have been a compliance with the policy. *Ibid.*
 14. The terms, "forthwith" in a policy of insurance, used in connection with giving notice to the underwriter of the occurrence of a loss by fire — and "as soon as possible" after a fire occurs, deliver a particular account of such loss, are not to be taken literally, but mean with due diligence, or without unnecessary procrastination or delay, under all the circumstances of the case. *Ibid.*; *St. Louis Ins. Co. v. Kyle*, 641.
 15. Where no objection is made to the statement of loss, or no request made for further information, the statement cannot be objected to on the trial. *Heath v. Franklin Ins. Co.* 634.
 16. The receiving a notice and failing to make objections to its being given in time, are no waiver of the notice. *St. Louis Ins. Co. v. Kyle*, 641.
 17. Formal defects in the preliminary proof of loss may be regarded as waived by the insurers' pleading their refusal to pay on other grounds, and evidence of such waiver may be given under an averment of performance. *Ibid.*
 18. By the terms of the policy of insurance, the insured was required, within thirty days after a loss, to transmit to the secretary of the company a particular account of such loss. The insured furnished a statement of loss within the proper time, made out under the advice of the agent of the company, and subsequently produced his books, at the request of the company, for further explanation. The company made at the time no objection to the account, and offered to pay a sum amounting to about three fourths of the loss. Subsequently, on being pressed for payment, they objected generally to the account as insufficient. *Held*, that under the circumstances the objection was no defence to a suit in equity for relief on account of the loss of the goods insured. *Bodle v. Chenango County Ins. Co.* 794.

OCCUPATION OF PREMISES.

1. *Disclosure of*. — The owner or tenant of a house, insuring against fire, is not bound to disclose or communicate to the insurers the names or pursuits of sub-tenants living on the premises. If the insurers wish to guard against the risk from certain pursuits or occupations of tenants or sub-tenants, they have it in their power to insert in the policy a warranty to that effect, which being a condition precedent, whether material or immaterial to the risk, must be complied with, before any action can be maintained on the policy. *Lyon v. Commercial Ins. Co.* 192.
2. *Hazard*. — The owner of a house which has been insured has a right to have it

- occupied by any one he pleases, provided the occupations of such persons, or the property placed in the house, is not of a nature to vitiate the policy under the conditions relative to hazardous or extra hazardous risks. *Ibid.*
3. Where a stock of goods in a house is insured, the manner in which the rest of the building is occupied cannot affect the policy, unless some warranty has been made in relation thereto, or there has been a concealment or misrepresentation of facts deemed by the jury material to the risk. *Ibid.*
 4. *Gambling Establishments.* — Where, pending the negotiations for a policy, the insurers expressed an objection to insuring property in the neighborhood of gambling establishments, and the applicant knew at the time that there was such an establishment within the premises in which the property was insured, it is for the jury to say whether this was a fact, the concealment or misrepresentation of which was so material to the risk, as to vitiate the policy. It is of no consequence whether it was considered material to the risk by the insurers; it must be considered so by the jury. *Ibid.*

ORGANIZATION OF COMPANY.

See *ESTOPPEL*, or pp. 593, 609.

PAROL AGREEMENT TO INSURE.

See *CONTRACT TO INSURE*, or p. 400.

PLEADING AND PRACTICE.

1. *Assignment.* — E., one of the insured in this case, made an assignment to F., the other insured party, of his interest in the property covered by the policy, the company's consent being given. A loss having subsequently occurred, this action was brought in their joint names, one count of the declaration alleging the assignment. *Held*, that the count was bad as it showed that the plaintiffs could not properly sue jointly. *Held*, also, that a plea in bar alleging the same facts in answer to another count was good. *Ferrius v. North American Fire Ins. Co.* 56.
2. *Fraud.* — In defence to an action for recovery of a sum under a policy of insurance against fire, it was, *inter alia*, pleaded that there was fraud in the original constitution of the contract: *Held*, in the circumstances of the case, that it was incumbent on the defenders either to take a special issue on the allegation of fraud, or to withdraw from the record the averment and pleas in law relative to that defence. *Campbell v. Aberdeen Fire & Life Assur. Co.* 84.
3. *Allegations.* — In an action on a policy of insurance, an allegation in the petition that the defendants were legally put in default, will be sufficient, without expressly alleging a compliance in detail with the provisions of the policy, when such compliance is proved on the trial. *Mason v. Louisiana Marine & Fire Ins. Co.* 118.
4. *Where Suits to be brought.* — The declaration in a suit in Suffolk county upon a fire insurance policy, described one of the plaintiffs as of Middlesex, and the other as of Suffolk county. The defendants pleaded in abatement that they were a corporation established by law, that their place of business was in Middlesex county, and that the plaintiffs' cause of action accrued to them, if at all, as members of the company in Middlesex county, and that their suit should have been brought there. The plea was held bad under the statute. *Boynton v. Middlesex Fire Ins. Co.* 181.
5. *Alienation. Grantee.* — A fire insurance policy provided that an alienation of the property should avoid the insurance, but added that in case of alienation the grantee, having the policy assigned to him, might have the same ratified and confirmed to him for his own proper use and benefit, upon application to the directors, and with their consent, within thirty days after such alienation, and that the grantee should then be entitled to all the rights and privileges of the party origi-

nally insured. *Held*, that a compliance with these terms gave the grantee a right to sue upon the policy in his own name, and deprived the grantor of the right to sue. *Mann v. Herkimer County Mut. Ins. Co.* 234.

6. *Evidence to support Allegation.* — Upon an issue taken on a plea traversing an allegation in a declaration that a specification of the particulars of a loss by fire had been delivered by the assured to the assurers, agreeable to a condition to that effect contained in the policy of insurance, it was held at *nisi prius* that the allegation was supported by evidence of a correspondence from which the jury might infer that the assurers had dispensed with the performance of such condition. *Held*, that it is too late for a defendant to move for a new trial after judgment for the plaintiff *non obstante veredicto*. *Pim v. Reid*, 245.
7. *Quære* — Whether a general allegation in a declaration that A. and B. (the plaintiffs) were interested in the property insured, is supported by proof that A. was mortgagor and B. mortgagee of the premises? *Ibid*.
8. *Who may sue.* — A bond made by an insurance agent, binding himself in a certain sum, for the faithful performance of duties, "to the said directors, their successors, or assigns," is in legal effect made to the company, so that they may sue thereon in the corporate name. *Bayley v. Onondaga County Mut. Ins. Co.* 311.
9. It is not necessary in such case that the declaration, in an action on the bond by the company in their corporate name, should aver that the bond was made to them by the name and description of the directors, &c. *Ibid*.
10. *Change of Venue.* — In a motion by an assurance company to change the venue after issue joined, to the county in which the fire took place, on an allegation that a view is necessary for the defence, this court will not grant the motion, unless the reason why such a view is necessary appear on the face of the affidavit. The mere statement in the affidavit that a view is necessary is insufficient. *McLoughlin v. Royal Exchange Assur. Co.* 313.
11. Motion by defendant to change the venue after issue joined to a county, because the witnesses for the defence reside there, is sufficiently met by the plaintiff on an allegation that the majority of his witnesses reside in the county in which he has brought the action. *Ibid*.
12. *Semle*, on behalf of a defendant the court will be slow to change the venue to a county in which the father of the attorney for the defendant is the sub-sheriff. *Ibid*.
13. *Declaration.* — Where the assured agrees that the boat shall be completely provided with "master, officers, and crew," it is necessary to aver, in an action on the policy, that the boat was so provided. *St. Louis Ins. Co. v. Glasgow*, 317.
14. *Defences.* — In an action by a manufacturing company against an insurance company upon policies of insurance, the defendants filed their plea of non-assumpsit, with notice of special matter to be given in evidence under the plea, to wit: that the plaintiffs had no title in fee simple, or otherwise, to three eighths of the premises upon which the insured buildings were erected; that the fact that they had a less estate than the whole in the premises was fraudulently concealed from the defendants, in making their application for insurance; that, at the time the policies were issued, and of the making of the premium notes, the premises were incumbered by mortgage, and judgments, &c., upon said three eighths; that certain mechanics' liens for the erection of said buildings, amounting to eighteen or twenty thousand dollars, also existed; that said facts were not set forth and disclosed in either of the applications for insurance, and that the defendants had no knowledge of such incumbrances at the time of issuing the policies, which concealment avoided the policies under the 13th section of the act entitled "An act to incorporate the Illinois Mutual Fire Insurance Company;" that subsequently to the issuing of said

- policies, the plaintiffs erected and added to one of the saw-mills insured a furnace with open boiler, for boiling or preparing shingle blocks for the machine, thereby increasing the risk or hazard of the insurers, without any additional premium therefor; that said applications were false and untrue in regard to the value and extent of the flouring-mill insured, the number of stones ready for the manufacturing of flour, &c.; and that the insured buildings were intentionally destroyed by fire by a person at that time a member of the plaintiffs' company: *Held*, that under this plea and notice, the defendants had a right to avail themselves of any matter of defence arising from the illegality of the insurance; from a non-compliance with some express or implied warranty or condition; from the want of a proper interest; from misrepresentation or concealment; or from a performance on their own part of the terms of the policies. *Illinois Mut. Fire Ins. Co. v. Marseilles Manuf. Co.* 353.
15. Policies of insurance are within the provision of the 12th section of the practice act, and may be read in evidence to the jury without proof of their execution, unless it be denied by plea verified by affidavit. *Ibid*.
16. By the act incorporating the Illinois Mutual Fire Insurance Company, the charter itself is made a part of the contract of insurance, and the insured being, by the act, members of the company, cannot plead ignorance of its provisions. *Ibid*.
17. *Interest*. — At common law, a policy of insurance is considered in the nature of a contract of indemnity, and though a declaration thereon does not contain any direct averment of interest, yet a general averment would import an insurable interest, which must be proved at the trial. *Ibid*.
18. If the insured in this company, at the time of the insurance, had a less estate than an unincumbered estate in fee simple in the premises, it was their duty to disclose the fact to the insurers. The omission, therefore, to state in their application that they had such an estate in fee simple, amounts to a warranty that their title is such as is required by the charter. Such warranty operates as a condition precedent to the assured's right of recovery, and a recovery cannot be had upon the policy, without an averment, supported by proof, that such condition has been complied with. *Ibid*.
19. In an action on a policy of insurance against fire, the plaintiff, on the trial, must prove that he had an insurable interest in the premises, before he can recover. *Ibid*.
20. *Agent*. — When an agent, by whom insurance had been effected, he being named as agent in the policy, swears to the loss as his, the oath will be considered as referring to the character in which he was recognized and acted when he effected it, and not as proof of perjury. *Henderson v. Western Marine & Fire Ins. Co.* 396.
21. The allegation in an answer that a third person is the real plaintiff in the action, is not sufficient to exclude his testimony. *Ibid*.
22. *Notice of other Insurance*. — It was required by the terms of a fire insurance policy, that notice of any subsequent insurance should be given, and that the same should be indorsed or otherwise acknowledged in writing. It had been decided in a suit at law that the policy was avoided by non-compliance with these terms. A suit in equity being now brought, it was *held*, that the sworn answer of the president of the company, denying that notice had been given of the subsequent insurance, required the production of more than one witness on the part of the complainant to overturn the same, notwithstanding the fact that the president was not in office when the alleged transaction took place. It was also *held*, that the proof produced by the complainant was not sufficient to make out his case. *Carpenter v. Providence Washington Ins. Co.* 448.
23. *Jurisdiction*. — The personal liability of the assured, if any, on his deposit note

is to be enforced only in a common law, and not in a chancery court. *McCulloch v. Indiana Mut. Fire Ins. Co.* 475.

24. *Evidence.* — The question arose in this case concerning the amount of merchandise contained in the building before it was burned; and it was held proper for the defendant to ask a witness who had often been in it, and who was employed in the adjoining building, whether the store in question contained a greater or less amount of goods than did his own, which was of about the same size, was filled with similar goods, and of which an inventory had been taken. *Howard v. City Fire Ins. Co.* 539.

25. *Who must sue.* — Where the assured has mortgaged the property insured and assigned the policy, before loss, to the mortgagee, suit upon the same should still be brought in the name of the party originally insured. *Jessel v. Williamsburg Ins. Co.* 190; *Conover v. Mutual Ins. Co.* 677.

26. *Ownership.* — In a declaration on a policy of insurance against fire, an averment that the premises insured were the property of the plaintiff is unnecessary. *Gilbert v. National Ins. Co.* 690.

27. *Who may sue.* — In a fire policy, the insurers, by an indorsement thereon, consented that the loss should be payable to the order of W.: Held sufficient in a declaration of covenant on the policy to allege that the loss was not paid to the plaintiff nor to W.; and that as such indorsement gave W. no legal interest in the property, it did not preclude the assured from maintaining an action in his own name; nor was it necessary to aver any order from W. in favor of the assured. *Ketchum v. Protection Ins. Co.* 698.

28. *Notice of Loss.* — By the tenth condition attached to the policy it was stipulated "that in the event of a loss the assured should deliver to the insurers a particular account in writing, signed with his own hand, and verified by his oath, and that he should also declare on his oath whether any and what other insurance had been made on the property insured, and in what general manner (as to trade, manufactory, merchandise, or otherwise) the building containing the property insured, and the several parts thereof, were occupied at the time of the loss, who were the occupants of such buildings, and when and how the fire originated, as far as he knew or believed, and that the assured should procure a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire, and not concerned in the loss as a creditor, or otherwise related to the assured; that he had made due inquiry into the cause and origin of the fire, and also the value of the property destroyed, and was acquainted with the character and circumstances of the assured, and did verily believe that the assured really and by misfortune, and without fraud or evil practice, sustained by such fire loss or damage to the amount therein specified." The declaration stated the fire to have happened on the 29th July, 1845, and that the compliance with this condition, in respect of notice of the fire, took place on the same day; as to the delivery of a particular account in writing, on the 20th August, 1845; and in respect to the declaration on oath, the 27th March, 1846: Held sufficient, the respective times having been laid under a *videlicet*; the performance of these acts, whether in due season or not, being matter of evidence. Held, also, that as W. had no legal interest, it was not necessary to state that he was not related to the notary. *Ibid.*

29. By the fifteenth condition annexed to the policy, it was declared, "that no suit or action of any kind against the insurers for the recovery of any claim under the policy should be sustained in any court of law or chancery, unless such suit should be commenced within the term of twelve months next after the cause of action accrued," &c.: Held, that this was a condition subsequent; the subject of a plea. Held, also, that an allegation in a count upon a policy containing this condition, that the

- insurers had no mayor, president, &c., upon whom process could be served (introduced to anticipate a probable objection that the action is not brought within the twelve months), is mere surplusage. *Ibid.*
30. *Duplicity.* — A plea, embodying the tenth condition, which stated that after the fire, to wit, on the 26th of August, 1845, the plaintiff was required by the defendants to deliver an account in writing under his hand, verified by his oath and by his books of accounts, &c., and permit extracts, &c., to be taken respecting the loss, &c., and the plaintiff refused, is not double, as they all go to establish one point, — the non-performance by the plaintiff, of that part of the tenth condition. *Ibid.*
31. *Interest.* — A traverse in a plea that the plaintiff was not interested in the goods insured to the whole amount of their value, is too large; for if he was interested in any part, he is entitled to recover *pro tanto*. *Ibid.*
32. *Performance of Condition.* — To a declaration, which averred performance by the plaintiff of all acts required by the tenth condition to be performed by him, a plea traversing the performance of all these acts is good, according to the rules of pleading at common law. *Ibid.*
33. *Account of Loss.* — A plea which first traverses an allegation in the declaration of the delivering an account of loss according to the tenth condition, and secondly, sets up fraud, is unobjectionable. The refusal to deliver an account in such case is indicative of fraud, and is consistent with the general charge of fraud subsequently made. *Ibid.*
34. *False Swearing.* — A plea alleging false swearing, in a statement A annexed to the declaration of loss made by the plaintiff, is bad, for not averring that any such statement was annexed, and for not showing when and before whom the oath was made, or in what particular the statement was false. *Ibid.*
35. *Kitchen.* — A plea averring a representation that there was a kitchen about fifteen feet from the dwelling, does not necessarily imply that it was used as such, and that no part of the dwelling was used as a kitchen, and without other averment showing clearly that the representation was fraudulent and misleading, and the hazard increased, the plea is not good. *Kentucky Ins. Co. v. Southard*, 765.
36. *Increase of Risk.* — A plea averring that the building was used for other purposes than those represented, which increased the hazard, should also show that it was used differently from the manner in which it was used at the date of the policy, and that the insurance would not have been made at the rate granted or at all, if the representation had been adhered to. *Ibid.*
37. *Fraud.* — A plea to an action on a policy of insurance, relying upon a fraudulent representation, should aver that the misrepresentation or concealment was material to the acceptance of the risk or rate of insurance, and to point out in what the insecurity consisted, and how the risk was greater. *Ibid.*
38. The insured should state truly his title to the premises insured; and a plea impeaching the policy in this respect should show such facts as will enable the court to say that the title has not been fairly disclosed, if they be true. *Ibid.*
39. *Who may sue.* — Under the charter of the defendants, an action in the name of the assignee of one of their policies (alienee of the property insured) might be maintained. *Bodle v. Chenango County Mut. Ins. Co.* 794.

POLICY.

1. *What it covers.* — An insurance on household furniture contained in a dwelling-house covers furniture stored in the garret, not in constant use. *Clarke v. Firemen's Ins. Co.* 64.
2. The retailing spirituous liquors without license does not constitute the occupant a tavern keeper within the meaning of the policy. *Rafferty v. New Brunswick Fire Ins. Co.* 138.

3. *A paper attached to a policy of insurance is, without express reference, prima facie a part of the policy, so that a violation of its terms will avoid the insurance.* *Roberts v. Chenango County Mut. Ins. Co.* 213.
4. *What it covers. Usage.* — In a valued policy against fire "on a new barque now being built," it was the design of the parties to cover the vessel in the process of construction, and indemnity was agreed to be furnished for her loss by fire, whatever might be the progress towards completion when the fire occurred. The policy, in the absence of proof of usage, did not attach upon articles made for the vessel, delivered in the ship-yard where it was building, in a condition and intended to be fitted and attached to it as soon as ready to receive them. *Mason v. Franklin Fire Ins. Co.* 214.
5. *Construction.* — A policy of insurance mentioned a building, oil-mill, of one floor only, with stone and tile, occupied by —, for crushing of linseed and grinding of dyewood, but no refining of oil therein, £1,000; on fixed machinery and mill-wright works, including all the standing and growing gear therein, £1,000; one engine-house adjoining the mill, £200; one steam-engine therein, £300; one log-wood warehouse, in which chopping dyewood is performed, communicating with the mill, £200; one warehouse on the other side of the mill, to the east side, merely for the stowing of goods, £300. *Held*, that there was no ambiguity in the policy, and that evidence was not receivable to show that it was intended to insure the machinery and gear in the logwood warehouse. *Hare v. Barstow*, 284.
6. *What it covers.* — A policy of insurance upon an unfinished house does not cover timbers to be put into its construction, lying in an adjoining building, though this be also insured. *Ellmaker v. Franklin Ins. Co.* 519.
7. *Construction.* — The property insured in this case, a brick building, was described as having "a composition roof, and occupied by several tenants, and connected by doors with the adjoining building, situate at the corner of Charles Street and the Western Avenue." *Held*, that the latter part of the description, beginning with the word "situate," referred to the building insured. *Heath v. Franklin Ins. Co.* 634.
8. Ambiguity in the description of adjoining premises considered. *Ibid*.

See PRIOR AND SUBSEQUENT INSURANCE, or p. 120.

POWERS.

1. *Credit.* — If the charter of an insurance company is wholly silent as to the power of the corporation to give credit for premiums, and to take notes in payment, such a power necessarily results from its power to make insurance, and to enable it to carry on its business advantageously. *McIntire v. Preston*, 802.
2. After the plaintiff has shown that such power exists in the company, it is incumbent on the opposite party to show that the power has been taken away. *Ibid*.
3. If the company has power to take such a note, and to hold and convey real or personal property, it has the power to negotiate the note. *Ibid*.
4. In such case an indorsee will be presumed to be a *bona fide* holder for value until the contrary is shown. *Ibid*.

PRELIMINARY PROOFS.

1. *Waiver.* — The preliminary proof required by the tenth condition may be waived, and being a question of fact, the mode of waiver need not be stated. The fifteenth condition being the subject of a plea, an averment in the declaration that the insurers had waived it, would not be traversable; therefore it might be passed by without notice. *Held, also*, that it could not be waived; that lapse of time extinguished the liability of the insurers, which could not be revived by waiver; but *semble*, that they might dispense with the condition by deed, and if a deed could avail as a dis-

pensation it should be replied to a plea of the condition. *Held, also*, that the fifteenth condition was valid in law, and operated as an effectual bar everywhere; therefore a plea of the fifteenth condition to a count containing an averment of waiver of this condition, is properly pleaded. A replication to such a plea, that the defendants were a foreign corporation, and that no action could have been sustained within the twelve months unless they had voluntarily appeared, and there was no means of compelling their appearance, although the plaintiff was willing to prosecute within the twelve months, is bad, as it neither confers nor avoids anything material, for the plaintiff might have sued out process within the twelve months, or the defendants might have been sued in the country where they were incorporated, and they are not estopped by voluntarily appearing, from setting up the lapse of time as a defence. *Ketchum v. Protection Ins. Co.* 698.

See NOTICE OF LOSS, or pp. 54, 56; WAIVER.

PREMIUM.

1. *Recovery of.* — In case the policy has not attached after the payment of premiums, the insured, in an action on the policy, with counts for money had and received, may recover, within six years, the amount of premiums paid by him. *Clark v. Manuf. Ins. Co.* 520.
2. Where the risk never attaches the premium must be returned, though there was neglect and even fault in the assured. *Ibid.*

See WAIVER, or p. 13.

PREMIUM NOTES.

If the policy is void by reason of a false warranty, the premium notes will be void for want of consideration. *Frost v. Saratoga Mut. Ins. Co.* 617.

See INSOLVENT COMPANIES; SECRETARY'S AUTHORITY.

PRIOR AND SUBSEQUENT INSURANCE.

1. *Insurance on different Objects.* — Where a person has his store insured by a company, one of the rules in the policy being, "that no person whose property is insured in the company shall be allowed to insure the same, or any other property connected with it, in any other company, or at any other office; and in case of any such insurance, his policy obtained from this company shall be void and of no effect;" and where he afterwards insures the goods in the store at another office, the policy on the store is not made void by obtaining the policy on the goods. *Jones v. Maine Mut. Fire Ins. Co.* 72.
2. The insurance to one joint owner is not made void by a subsequent insurance by the other owners or their interest, without notice to the first company. *Franklin Marine & Fire Ins. Co. v. Drake*, 98.
3. *Notice of.* — A clause in a policy of insurance requiring notice of any insurance made in any other office, *held* to apply to subsequent as well as to prior insurance. *Stacey v. Franklin Fire Ins. Co.* 108.
4. *Void Policy.* — A clause in a policy forbidding other insurance without the consent of the present company, does not affect a prior insurance if the latter policy could not have been enforced at any time. *Ibid.*
5. *Insurance on other Property.* — Information by the insured under the later policy that he has another policy, but adding that it was issued to cover other property, would not make the second company liable under the clause last mentioned. *Ibid.*
6. *Voidable Policy.* — A fire insurance policy, insuring the interest of a mortgagor, in which permission is granted to assign the policy to A., who is in fact the mortgagee, though not so named, covers the interest of the mortgagor, and not that of the

- mortgagee; and such a policy therefore constitutes "other insurance by the insured on the property hereby insured," within the meaning of a provision concerning other insurance in a subsequent policy obtained by the mortgagor. Want of notice of such prior insurance will not be excused by reason of the fact that the prior policy was voidable by the insurer. And the notice must be in writing. *Carpenter v. Washington Providence Fire Ins. Co.* 120. See note, p. 137.
7. *Condition Broken.*—Where a policy of insurance provides that, "in case the insured have any other insurance against loss by fire on the property, not notified to the insurers, nor mentioned in or indorsed upon the policy, or shall afterwards make any other insurance thereon, and shall not, with all reasonable diligence, give notice thereof, and have the same indorsed on the policy, or acknowledged in writing, the policy shall be void," proof that another policy was obtained on the property, which was not notified to the insured, will discharge the latter from all liability. *Battaille v. Merchants' Ins. Co.* 231.
 8. Where one of the conditions of a policy against fire requires, as part of the preliminary proof, without which no recovery can be had, a declaration under oath, "whether any, and what other insurance has been made on the same property," the insured will forfeit his right to recover by failing to comply with the condition. *Ibid.*
 9. *Verbal Notice.*—In case a policy of fire insurance, which requires notice of prior insurance, does not provide that such notice shall be made part of the application, or that it shall be in writing, verbal notice will be sufficient. And in such case notice to a regular agent of the company given while he is engaged in the business and acting within the scope of his authority, is notice to the company. *McEwen v. Montgomery Co. Ins. Co.* 269.
 10. *Waiver.*—If, in reply to a notice of other insurance, the company's secretary says, "We have received your notice of additional insurance," and offer no objection to it, it will be considered that the company approved of it. *Potter v. Ontario Mut. Ins. Co.* 272.
 11. *Election.*—When a policy requires notice of other insurance, subject to the company's approval of the same, the company has its election to continue or terminate the risk upon receipt of such notice; but the policy remains in force until notice of its termination is given. *Ibid.*
 12. *Assignment. Notice by Assignee.*—When a policy of insurance provides that, "in case the insured have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in, or indorsed on this instrument, or otherwise acknowledged by them in writing, this insurance shall be void;" and a third person, to whom the property insured had been assigned and to whom the policy was transferred with the assent of the insurers, fails to notify the latter at the time of the transfer of another policy previously taken out by him on the same property, the insurers will be discharged. A declaration of the first insurance made after the loss, in compliance with a condition of the policy requiring all persons insured sustaining any loss, to declare on oath whether any and what other insurance has been made on the same property, will be too late. *Leavitt v. Western Marine & Fire Ins. Co.* 295.
 13. *Compliance with Condition.*—A fire insurance policy provided that "all policies which may issue from this company, to cover property previously insured, shall be void, unless such previous insurance be expressed in the policy at the time it issues." *Held*, that though this was a condition precedent, it was complied with by the following memorandum written on the policy: "Five thousand dollars insured by the W. Ins. Co." And this too though but \$4,700 of the amount was in fact insured upon the building covered by the present policy, the balance being upon a barn adjacent. *Liscom v. Boston Mut. Fire Ins. Co.* 393.

PROFITS.

1. *Not covered unless expressly insured.* — The general principle, that the assurers are bound to adjust a loss upon the principle of replacing the assured, as near as may be, in the situation they were in before the fire, has never been understood to extend to the profits or fruits which the latter was drawing, or might have drawn from the thing insured. *Leonarda v. Phoenix Assur. Co.* 188.
2. *Held*, that an insurance on buildings against fire does not, without special stipulation, cover consequential damage arising from want of occupancy during the time when the premises are under repair in consequence of fire; nor loss of profit that might have been made by the occupant by his trade, in the subjects during that period; nor wages of servants engaged on the premises, and which the occupier was bound to pay to them, though, in consequence of the destruction of the property, he received no return in service for such wages: and *held*, further, that this general rule was confirmed by a specialty in the policy of insurance, which gave the insurance company the option, either to pay the loss in money or to rebuild and repair the premises, which implied that the kind of loss for which the company was liable, was one which could be compensated by rebuilding and repairing. *Menzies v. North British Ins. Co.* 514.

See RENTS, or p. 666.

PRO RATA ADJUSTMENT.

When made. — In the case of an insurance in a mutual company, if a loss occur requiring the proceeds of all the deposit notes and an assessment of one per cent. upon insured property, to meet the loss, the insured will not be compelled to submit to a *pro rata* adjustment of such funds with other parties insured, whose property has subsequently, before the notes are collected, been destroyed by fire. *Coston v. Alleghany County Mut. Ins. Co.* 419.

REBUILDING.

More Durable Structure. — In an action upon a fire insurance policy, it appeared that the property insured, a store, having burnt down, was rebuilt by the company, according to the terms of the policy, but upon a plan somewhat different from the original; and the jury were instructed that no deduction was to be made from the expense of rebuilding, though the new store might be more durable than the old would have been, and for some purposes more valuable. *Held*, erroneous. *Brink v. National Ins. Co.* 471.

See ASSIGNMENT, or p. 630.

RECEIPT OF PREMIUM.

See PREMIUM; WAIVER, or p. 13.

RECEIVERS.

See INSOLVENT COMPANIES.

REFERENCE.

See FRAUD, or p. 93; INSOLVENT COMPANIES, or p. 604.

REINSURANCE.

1. The object of reinsurance is to throw the risk of the insurer upon other underwriters; and in case of loss, the reinsurer pays the whole amount which the insurer incurs. *Hone v. Mutual Safety Ins. Co.* 579.

2. Parol evidence of a custom in New York, at variance with this principle, will not be received. *Ibid.*
3. In a case of reinsurance, the original insurer is not bound to pay the loss before he can maintain an action against the reinsurer, and the solvency or insolvency of the former is immaterial. *Ibid.*

RELATION.

- A policy bearing date on the day the premium is paid, takes effect by relation from that day, although not delivered until several days afterwards. *Lightbody v. North American Ins. Co.* 1.

REMOTE LOSS.

- Removal of Goods.* — In an action by a mutual insurance company upon a premium note, the defendant attempted to set off a loss occurring to him by the removal of goods from the building insured to save them from an apprehended destruction by fire; though it appeared that the fire had not touched the goods or the building containing them. *Held*, not a proper case for set-off. *Hillier v. Alleghany County Mut. Ins. Co.* 497.

RENEWAL NOTES.

See *INSOLVENT COMPANIES*, or pp. 601, 602.

RENT.

Under a policy of insurance on a house, with the condition that, in case of loss, the assured may either reinstate the building, or pay the amount of the loss as soon as proved, rent for the period occupied in rebuilding or repairing, cannot be recovered as part of the indemnity due to the assured. Such rent formed a distinct insurable interest. *Leonarda v. Phoenix Assur. Co.* 188; *Niblo v. North American Ins. Co.* 666.

See *PROFITS*, or p. 514.

REPAIRS.

1. A policy of fire insurance contained a provision that the building insured should not be appropriated to carrying on therein any trade, business, or vocation mentioned, such as houses building or repairing. *Held*, that the provision was not violated by making ordinary and necessary repairs upon the building. *Held*, also, that whether the making of repairs upon the building was an increase of the risk, was a question of fact for the jury, in the absence of specific language in the policy. *Grant v. Howard Ins. Co.* 266.
2. Where the assured stipulates in the policy that the boat shall be completely provided with "master, officers, and crew," it is no breach of such stipulation that the boat was placed, temporarily, in the charge of workmen, for the purpose of repairs. *St. Louis Ins. Co. v. Glasgow*, 317.

REPLACING GOODS.

See *INJUNCTION*, or p. 20.

REPRESENTATION.

1. *Consignment.* — In a policy effected by commission merchants, goods held on consignment may be described as "their stock." *Franklin Fire Ins. Co. v. Hewitt*, 202.
2. *Existing or Past Facts.* — The term "representation," in its application to insurance, has reference only to existing or past facts, and not to matters resting in intention; and therefore when a party proposing an insurance verbally agreed to discontinue a fire-place in the premises, and a policy was thereupon made out, *held*,

- that in an action thereon it was no defence that the fire-place had not been discontinued. *Alston v. Mechanics' Mutual Ins. Co.* 219.
3. *Adopted by Policy.* — The representations of the assured in his application in this case, *held* to have been adopted by the policy as part of the contract of insurance. *Houghton v. Manufacturers' Mutual Fire Ins. Co.* 346.
 4. It was *held*, further, that the answers, being termed "representations" in the policy, were to have the effect of representations rather than that of warranties. *Held*, also, that so far as the answers were material to the risk, their substantial truthfulness was a condition precedent to the liability of the defendants. *Ibid.*
 5. *True so far as known.* — Whether the assured knew of facts and circumstances not stated, or inaccurately stated, where he stipulates that the representations made are true, "so far as known," is a question of fact for the jury. *Ibid.*
 6. *Warranty.* — Certain representations as to usages and practices observed in the building insured, *held* to amount to a stipulation that the same should be substantially continued. *Ibid.*
 7. *Full Exposition.* — In construing the representations, both as to existing facts and as to future precautions to be taken, good faith, as well as the terms of the policy, requires that there shall be a full and just, as well as true, exposition. A mere literal conformity is not always sufficient. *Ibid.*
 8. *Examination after Work.* — A representation having been made that an examination of the building was made thirty minutes after the cessation of work, *held*, that this required such examination in cases of extra work as well as in ordinary cases. *Ibid.*
 9. What constituted a cessation of work is a question of fact for the jury. *Ibid.*
 10. *Misdescription.* — A description of the property to be insured as if the applicant were the sole owner, when in fact he is only a tenant in common, avoids the policy. *Catron v. Tennessee Marine & Fire Ins. Co.* 427. See note, p. 436.
 11. *A gross over-valuation*, as representing the property worth \$12,000, when it was worth only \$8,000, avoids the policy. *Ibid.*
 12. *Parol Evidence.* — Where a policy alludes to representations which had been made, and which were to be binding, without incorporating them into the contract, parol evidence may be given of them. *Clark v. Manufacturers' Ins. Co.* 520.
 13. Certain facts *held* competent evidence of the company's assent to the representations referred to in the policy. *Ibid.*
 14. *Fraud.* — It is not material that a misrepresentation of a material fact was not made fraudulently. *Ibid.*

RISK, INCREASE OF.

See INCREASE OF RISK.

SALE.

Executory Contract. See p. 28.

See ALIENATION; ASSIGNMENT, OF p. 28; VENDOR AND PURCHASER, OF p. 490.

SALVAGE.

The law of marine insurance, respecting salvage, does not apply to insurance against fire. *Liscom v. Boston Mut. Fire Ins. Co.* 393.

SECRETARY'S AUTHORITY.

1. The authority of the secretary of an insurance company to consent to an assignment for the company will be presumed in the absence of proof to the contrary. And even if evidence of his authority were necessary, proof that he had often done this without objection would be sufficient. *Conover v. Mut. Ins. Co.* 677, 682.
2. A note payable to an insurance company was indorsed thus: "Without recourse,

Joel Scott, Sec'y." It was objected that this was not an indorsement by the corporation. *Held*, that the secretary's authority could only be questioned by plea of the defendant, verified by affidavit. *Held*, further, that the indorsement was sufficient to pass the legal title to the note. *McIntire v. Preston*, 802.

See POWERS.

SECURITY NOTE.

See INSOLVENT COMPANIES.

SET-OFF.

See REMOTE LOSS, or p. 497.

STORING.

The keeping of spirituous liquors in the building insured for purposes of consumption, or for sale by retail to boarders and others, is not a *storing* within the meaning of the policy. *Rafferty v. New Brunswick Fire Ins. Co.* 138.

SURVEY AND SURVEYOR.

See BY-LAWS, or p. 339; EVIDENCE, or p. 765; WARRANTY, or p. 765.

TAVERN KEEPER.

See POLICY, or p. 138.

TENANT BY CURTESY.

See INSURABLE INTEREST, or p. 98.

TENANT FOR LIFE AND REVERSIONER.

Adjustment of Loss between. — A building insured, in which one person is entitled to a life estate and another to the reversion, sustains a partial injury from fire. *Held*, that the tenant for life is entitled to have the amount due from the insurance office applied to the repair of the building. The owner of the reversion is also entitled to have the insurance money applied to the repair of the building. *Brough v. Higgins*, 443.

USAGE.

Vessel. — A policy of insurance against fire upon a vessel building in the port of Baltimore, and for a specified period, is not controlled in its operation by proof of usage in other ports of the Union. Such usage could not be considered as entering into the views of the parties in the present contract. *Mason v. Franklin Fire Ins. Co.* 214.

See REINSURANCE, or p. 579.

VALUATION.

1. *Conclusion, when.* — Valuation of the premises insured, deliberately made by mutual agreement between the parties to the contract of insurance, is, in the absence of fraud, collusion, or misrepresentation, to be taken as the best evidence of the actual value of the premises. *Fuller v. Boston Mut. Fire Ins. Co.* 177.
2. The statement of the value of the premises insured, made in the application, is conclusive upon the applicant. *Holmes v. Charleston Mut. Fire Ins. Co.* 420.

VENDOR AND PURCHASER.

Sale without Conveyance. — In a petition by N. in the course of a suit for partition, it appeared that N. had purchased the premises under a decree of the court, and

that the master's report had been confirmed, but no conveyance had been executed. Prior to the partition sale the premises had been insured by the parties to the suit, and after the sale and confirmation to N. the property was destroyed by fire. *Held*, that in equity the property belonged to N., and that she was entitled to the insurance, and that the other parties must unite in giving her the necessary authority to settle and adjust the loss. *Gates v. Smith*, 490.

VESSEL.

See USAGE, or p. 214.

WAIVER.

1. *What constitutes.* — If a policy of insurance, executed by a mutual fire insurance company, is obtained upon the suppression of a fact material to the risk, a subsequent reception by the company of an instalment on the premium note of the insured, does not render the policy binding upon the company, where neither the company nor their agent have notice of the existence of the fact suppressed. *Allen v. Vermont Fire Ins. Co.* 13.
2. What is or is not a waiver of the preliminary proof, must depend on the circumstances and the language used at the time. *Charleston Ins. & Trust Co. v. Neve*, 153.
See ALIENATION, or p. 344; NOTICE OF LOSS, or p. 50.

WARRANTY.

1. *Warranty in Sales.* — The doctrine that a general warranty on the sale of property does not extend to defects which are obvious to the senses, does not apply to the case of warranties in policies of insurance. *Jennings v. Chenango Co. Mut. Ins. Co.* 437.
2. *How Constituted.* — A policy of insurance, after describing the nature of the risk in general terms, added, "Reference being had to the application of said H. J. for a more particular description, and the conditions annexed, as forming a part of this policy." *Held*, that this clause made the conditions and application parts of the contract, and thereby rendered the statements in the application warranties; so that anything therein short of literal accuracy would avoid the policy. *Ibid.*
3. The doctrine of warranty and representation considered. *Clark v. Manuf. Ins. Co.* 520.
4. A statement in the policy, that the premises insured were the property of the plaintiff, does not amount to a warranty. *Gilbert v. National Ins. Co.* 690.
5. The policy in this case contained the following clause: "Reference being had to the application of the said K. E. for a more particular description and forming a part of this policy." *Held*, that the application was thereby engrafted as a whole into the contract, and its statements all made warranties. *Egan v. Mut. Ins. Co.* 696.
6. The general rule in insurance is that a warranty must appear on the face of the policy, and no instructions are regarded as warranties unless inserted in the policy. *Kentucky Ins. Co. v. Southard*, 765.
7. *Survey.* — The statements in the survey and application are not in general to be regarded as warranties; though if untrue they may amount to such misrepresentations as will avoid the policy, and if relied on in defence the plea should show the importance and untruth of the representations. *Ibid.*
8. *Contiguous Buildings.* — If the statement of the insured as to contiguous buildings amounts to a warranty and the warranty is falsified, it avoids the policy, whether the facts warranted against be material to the risk or not. *Gates v. Madison County Mut. Ins. Co.* 785.

See DISTANCE OF BUILDINGS, or p. 785; HAZARDOUS TRADES OR BUSINESS, or p. 24; LEASEHOLD INTEREST, or p. 666.

